

No. 12537

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

NIELS K. WIBYE,
Appellee.

UNITED STATES OF AMERICA,
Appellant,
vs.

HAROLD WIBYE,
Appellee.

Transcript of Record

Appeals from the United States District Court,
Northern District of California,
Southern Division.

JUL 24 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,

United States Attorney,

Northern District of California,

Attorney for Defendant and Appellant.

NICHOLS, RICHARD, ALLARD & WILLIAMS,

EUGENE L. STURGIS,

JOHN D. DEN-DULK,

Attorneys for Plaintiffs and Appellees.

In the District Court of the United States, for the
Northern District of California, Southern Division.

No. 27694-G

NIELS K. WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff, complains of the defendant above named and for cause of action alleges as follows:

I.

That this action is prosecuted under and pursuant to the provisions of that certain Act of the Congress of the United States of America generally known and designated as "Public Law 601," Title IV thereof, generally known as "Federal Tort Claims Act."

II.

That at all times herein mentioned John E. Hadley, now deceased, was the agent, servant and employee of said defendant, United States of America, and was at all of the times herein mentioned acting within the course and scope of his employment for said defendant, United States of America, while operating that certain Plymouth automobile herein-after mentioned; that said Plymouth automobile was

at all times herein mentioned owned by said defendant, United States of America.

III.

That at all times herein mentioned State Route No. 513 was a public road and highway, running in a general easterly and westerly direction, in the County of Alameda, State of California, between the Town of Dublin on the east and the City of Hayward on the west; that at all times herein mentioned Dublin Road was another public road and highway, running in a general northerly and southerly direction, in said County of Alameda, State of California, which said Dublin Road did at all times herein mentioned and now does intersect said State Route No. 513 at a point thereon between said Town of Dublin on the east and said City of Hayward on the west.

IV.

That at all times herein mentioned said Town of Dublin and said City of Hayward, in said County of Alameda, State of California, and said State Route No. 513 running between said locations, were and now are in the confines of the Northern District of California, Southern Division, of the District Court of the United States.

V.

That on or about the 8th day of November, 1946, plaintiff herein was riding as a guest in a certain Oldsmobile automobile then and there being driven and operated upon said State Route No. 513 in a general easterly direction at a point thereon ap-

proximately two-tenths of a mile westerly of the intersection of said State Route No. 513 with said Dublin Road; that at said time and place said defendant, United States of America, acting by and through its said employee, John E. Hadley, now deceased, and John E. Hadley, now deceased, were driving and operating a certain Plymouth automobile in a general westerly direction upon said State Route No. 513 at said location as aforesaid; that at said time and place said defendant, United States of America, acting by and through its said employee, John E. Hadley, now deceased, and John E. Hadley, now deceased, did then and there so carelessly and negligently drive, operate and control said Plymouth automobile as to cause it to and it did violently strike and collide with the said Oldsmobile automobile in which said plaintiff was riding, as aforesaid; that as a direct and proximate result of the said carelessness and negligence of said defendant, United States of America, acting by and through its said employee, John E. Hadley, now deceased, and John E. Hadley, now deceased, as aforesaid, plaintiff herein was thrown violently in and about said Oldsmobile automobile in which he was riding as a guest and did then and there have inflicted upon him the following personal injuries, to wit:

Deep laceration of the right wrist approximately 5 inches in length requiring suturing, and severing 3 extensor tendons, resulting in limitation of motion in said wrist; deep laceration of the left upper arm approximately 4 inches in length requiring sutur-

ing, resulting in partial severance of the triceps tendon; deep laceration of the left forearm approximately 2 inches in length requiring suturing; deep laceration of the left thumb approximately 2½ inches in length requiring suturing; deep laceration in the left armpit approximately 4 inches in length requiring suturing; fracture of the posterior superior lip of the left acetabulum; inter-trochanteric fracture of the right hip; depressed condylar fracture of the lateral condyle of the right tibia, resulting in spraining and tearing of the ligaments, tendons and tissues in the vicinity of the right knee joint, resulting in stiffening of said knee joint; severe cerebral concussion; blow upon the mouth resulting in loosening and damage to all of the upper front teeth which will require extraction of all of said upper teeth; severe nervous shock; cuts, bruises and abrasions to plaintiff's entire body; that by reason of said injuries and each of them plaintiff was made sick, sore, lame and disabled and plaintiff is informed and believes and therefore alleges that said injuries and each of them are permanent in character.

VI.

That as a direct and proximate result of the said carelessness and negligence of said defendant as hereinabove alleged, and solely by reason thereof, plaintiff has been generally damaged in the sum of \$100,000.00.

VII.

That by reason of his injuries and each of them so sustained as aforesaid, plaintiff was compelled to

and did incur the following obligations to the date hereof for the purposes set forth in connection with the care and treatment of the injuries suffered and sustained by him, to wit:

Physicians and surgeons services.....	\$1228.00
Hospital and Laboratory services	1710.41
Nursing hire	900.00
X-ray pictures	235.00

that each of the amounts hereinbefore set forth were and are the reasonable value of said services so rendered to plaintiff to the date hereof in connection with the care and treatment of his said injuries and incidental thereto; that plaintiff is informed and believes and therefore alleges that he will require additional services of physicians and surgeons, hospital and laboratory services, nursing hire, X-ray pictures, and dental services in the future in the care and treatment of his said injuries, the reasonable value of which is at this time unknown to him and the plaintiff prays leave of court that when the reasonable value of said additional services of physicians and surgeons, hospital and laboratory services, nursing hire, X-ray pictures, and dental services to be rendered and procured in the future become known to him, he be permitted to insert the same herein with appropriate charging allegations.

Wherefore, plaintiff prays judgment against the defendant above named in the sum of \$104,073.41, for his costs of suit herein incurred and for such

other and further relief as to the court seems just and proper.

/s/ NICHOLS, RICHARD &
ALLARD,
Attorneys for Plaintiff.

State of California,
County of Alameda—ss.

Niels K. Wibye, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the above and foregoing Complaint and knows the contents thereof that the same is true of his own knowledge except as to the matters which are therein stated upon information and belief and as to those matters that he believes it to be true.

/s/ NIELS K. WIBYE.

Subscribed and sworn to before me this 6th day of October, 1947.

[Seal] LYNN ALLEN,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed October 11, 1947.

[Title of District Court and Cause.]

No. 27694-G

ANSWER TO COMPLAINT

Comes now defendant, United States of America,

and answering plaintiff's Complaint on file herein, denies and alleges as follows:

I.

Denies the allegations contained in Paragraph VI, and the portion of Paragraph V beginning with the word "that," Line 31, page 2, to and including the word "character," Line 4, page 4, and the portion of Paragraph VII, beginning with the word "that," Line 11, page 4, to and including the figures "235.00," Line 19, page 4; and denies that plaintiff has been damaged in the sum of \$104,073.41 or any part thereof, or in any sum or amount, or at all.

II.

Alleges that it is without sufficient information to form a belief as to the truth of the allegations contained in the portion of Paragraph V commencing with the word "That," Line 21, page 2, to and including the words "Dublin Road," Line 26, page 2, and the allegations contained in the portion of Paragraph VII beginning with the word "that," Line 20, page 4, to and including the word "allegations," Line 2, page 5, and therefore, and basing its denial upon that ground, said defendant denies each and all of said allegations.

III.

Further answering said Complaint and as a separate defense thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by an unavoidable accident.

IV.

Further answering said Complaint and as a separate defense of contributory negligence thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by plaintiff's own carelessness and negligence proximately contributing thereto, and alleges that said plaintiff failed to use his eyes and other faculties, failed to use ordinary care and caution to protect himself from injury upon the occasion referred to in the Complaint, and carelessly and negligently rode and continued to ride in the automobile referred to in said Complaint while the same was being operated by one Harold Wibye in a careless, reckless and negligent manner by said Harold Wibye with the knowledge and consent of the plaintiff herein, thereby proximately contributing to the cause of the accident and injuries and damages complained of, if any there were.

Wherefore, said defendant prays that plaintiff take nothing by his Complaint herein and that said defendant be hence dismissed with its costs.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney, Attorneys for Defendant,
United States of America.

[Endorsed]: Filed April 15, 1948.

[Title of District Court and Cause.]

No. 27694-G

AMENDED ANSWER

Now comes the defendant and by leave of Court first had and obtained, amends its answer as follows:

I.

Denies that John E. Hadley was at the time of the accident acting within the course or scope of his employment or was at that time an agent, servant or employee of defendant.

II.

Admits that at all times herein mentioned that certain Plymouth automobile mentioned in said complaint was owned by defendant United States of America.

Wherefore, defendant prays that this complaint be dismissed and that it have its costs incurred herein.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed June 22, 1949.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 27732H

HAROLD WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff above named and complains of defendant above named, and for cause of action alleges as follows:

I.

That at all times herein mentioned defendant, United States of America was and now is a Federal sovereign State, organized and existing under and by virtue of the Constitution of the United States and laws made pursuant thereto; that this action is prosecuted under and pursuant to the provisions of that certain Act of Congress of the United States of America and known and designated as "Public Law 601" title IV thereof, generally known as "Federal Tort Claims Act";

II.

That at all times herein mentioned the defendant, United States of America, owned and operated that certain Plymouth automobile, designated by the

Serial No. USA 142857 and further designated by Departmental designation SEGO ADM 12;

III.

That at all times herein mentioned, John E. Hadley, now deceased, was the agent, servant and employee of the said defendant, United States of America, and was at all times herein mentioned, acting within the course and scope of his employment for said defendant, United States of America, while operating the aforesaid Plymouth automobile;

IV.

That at all times herein mentioned, U. S. Highway No. 50, also known as State Route 513, at the point hereinafter designated, was and now is a public Road and Highway in the State of California, running between the Town of Castro Valley on the West, and the Town of Dublin on the East; that said U. S. Highway No. 50, also known as State Route 513 at the point hereinafter designated, runs in a general Easterly and Westerly direction; that another public Road and Highway, within the State of California, known as Dublin Road, at all times herein mentioned did and now does intersect the aforesaid U. S. Highway No. 50 at a point between said Town of Castro Valley and the said Town of Dublin; that that portion of U. S. Highway No. 50, also known as State Route 513, mentioned and described in paragraph V of this complaint, was at all times herein mentioned and now

is within the Northern District of the State of California, Southern Division of the District Court of the United States;

V.

That heretofore, to wit: on or about the 8th day of November, 1946, plaintiff herein was operating a certain Oldsmobile Model 66 Business Coupe automobile, Serial No. 66-70668, motor No. G-394390 in a general Easterly direction on the aforesaid U. S. Highway No. 50, also known as State Route 513, at a point thereon approximately two-tenths of a mile Westerly of the intersection of the said U. S. Highway No. 50 with the said Dublin Road; that at said time and place, said defendant, United States of America, acting by and through its said employee, John E. Hadley, now deceased, and John E. Hadley, now deceased, were driving and operating the aforesaid Plymouth automobile in a general Westerly direction upon the aforesaid U. S. Highway No. 50 at the point as aforesaid; that at said time and place the said defendant, United States of America, acting by and through its employee, John E. Hadley, now deceased and John E. Hadley, now deceased, did then and there so carelessly and negligently drive, operate and control said Plymouth automobile so that it did violently strike and collide with the aforesaid Oldsmobile automobile being operated by plaintiff; that as a direct and proximate result of the said carelessness and negligence of the said defendant, United States

of America, acting by and through its employee, John E. Hadley, now deceased and John E. Hadley, now deceased, plaintiff was thrown violently in and about the said Oldsmobile automobile being operated by plaintiff, and did then and there have inflicted upon him serious injuries as follows: severe blow on the left part of the head over the left eye, resulting in cerebral concussion, loss of vision in the left eye and severe headaches and nausea; abrasions upon and about the face and teeth; contusion of left chest and shoulder; severe cervical strain with traumatic cervical neuritis on the left side resulting in severe headaches and nausea; six-inch laceration of the anterior of the left patella requiring suturing; four inch laceration across the anterior of the right patella requiring suturing; severe wrench of the neck and upper back with post traumatic parascapular myositis bilaterally; severe persistent pains in the abdomen from the bowels to the chest; cuts, bruises and abrasions to plaintiff's entire body; severe nervous shock; that as a direct and proximate result of the aforesaid injuries, and each of them, plaintiff was made sick, sore and disabled and continues to be sick, sore and disabled, and plaintiff is informed and believes and therefore alleges that the aforesaid injuries are of a permanent nature; that at all times since sustaining said injuries, plaintiff has suffered and still does suffer great pain and anguish and plaintiff is informed and believes and upon such information and belief alleges that he will continue to suffer such physical pain and anguish;

VI.

That as a direct and proximate result of said carelessness and negligence of the said defendant as hereinabove alleged, and solely by reason thereof, plaintiff has been generally damaged in the sum of Seventy Five Thousand (\$75,000.00) Dollars;

VII.

That by reason of the injuries sustained by plaintiff as hereinabove set forth, for treatment of the aforesaid injuries, plaintiff incurred obligations as follows:

Physicians and Surgeons services.....	\$240.00
X-rays	96.30
Hospital and Laboratory services.....	198.91
Convalescent and nursing care.....	475.00
<hr/>	
Total	\$1010.21

that the amount set forth are the reasonable value for services rendered to plaintiff; that plaintiff is still under the care and treatment of physicians and surgeons, and plaintiff is informed and believes and therefore alleges that he will require further services in connection with the care and treatment of his injuries; that the reasonable value of said further services as may be required is not known at this time and plaintiff prays leave of the Court that when the reasonable value of said additional services are ascertained, he be permitted to amend this complaint, setting forth such additional amounts as may be required;

VIII.

That prior to the date of the accident hereinabove alleged, plaintiff was gainfully employed in the occupation of Construction Superintendent, and that for approximately five (5) years immediately preceding the aforesaid accident, to wit: five (5) years immediately preceding November 8th, 1946, plaintiff was earning the sum of approximately One Hundred and Forty (\$140.00) Dollars per week; That since the date of the accident as hereinabove alleged, to wit: November 8th, 1946, plaintiff has been unable to carry on the occupation for which he is fitted, by reason of the injuries sustained by plaintiff as the result of the accident as aforesaid; that he has lost earnings prior to the date of this Complaint, and since the date of the accident, in the sum of Seven Thousand Two Hundred and Eighty (\$7280.00) Dollars, or thereabouts; that plaintiff is still unable to work and is informed and believes and therefore alleges that he will continue to be unable to work; that he will be further damaged in the sum of One Hundred and Forty (\$140.00) Dollars per week for each and every week that he is unable to work by reason of said injuries.

Wherefore, plaintiff prays judgment against defendant above mentioned in the sum of Eighty Three Thousand Two Hundred Ninety and 21/100 (\$83,290.21) Dollars; for his costs of suit and for

such other and further relief as to the Court seems meet and proper.

/s/ EUGENE K. STURGIS,

/s/ JOHN D. DEN-DULK,

Attorneys for Plaintiff.

State of California,
County of Alameda—ss.

Harold Wibye, being first duly sworn, deposes and says: that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated upon his information and belief and as to those matters, that he believes it to be true.

/s/ HAROLD E. WIBYE.

Subscribed and sworn to before me this 5th day of November, 1947.

[Seal] /s/ JOHN D. DEN-DULK,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed November 6, 1947.

[Title of District Court and Cause.]

No. 27732-H.

ANSWER TO COMPLAINT

Comes now defendant United States of America, and answering plaintiff's Complaint on file herein, denies and alleges as follows:

I.

Denies the allegations of Paragraph VI, the portion of Paragraph V beginning with the word "that," Line 5, page 3, to and including the word "shock," Line 30, page 3, and the portion of paragraph VII, beginning with the word "That," Line 14, page 4, to and including the figures "\$1010.21," Line 22, page 4; and denies that plaintiff has been damaged in the sum of \$83,291.21, or any part thereof, or in any sum or amount or at all.

II.

Alleges that it is without sufficient information to form a belief as to the truth of the allegations contained in Paragraph VIII, the portion of Paragraph V, beginning with the word "that," Line 30, page 3, to and including the word "anguish," Line 7, page 4, and the portion of Paragraph VII beginning with the word "that," Line 23, page 4, to and including the word "required," Lines 32-33, page 4, and, therefore, and basing its denial upon that ground, denies each and all of said allegations.

III.

Further answering said Complaint and as a sep-

arate defense thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by an unavoidable accident.

IV.

Further answering said Complaint and as a separate defense of contributory negligence thereto, said defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by plaintiff's own carelessness and negligence proximately contributing thereto; and alleges that said plaintiff failed to use ordinary care and caution to protect himself from injury upon the occasion referred to in the Complaint, failed to use his eyes and other faculties upon said occasion and carelessly and negligently drove and operated his automobile on such occasion so that same was caused to collide with the other automobile referred to in the Complaint, thereby proximately contributing to the cause of the accident and injuries and damages complained of, if any there were.

Therefore, said defendant prays that plaintiff take nothing by his Complaint herein and that it be hence dismissed with its costs.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ DANIEL C. DEASY,
Assistant U. S. Attorney, Attorneys for Defendant,
United States of America.

[Endorsed]: Filed April 15, 1949.

[Title of District Court and Cause.]

No. 27732-H

AMENDED ANSWER

Now comes the defendant and by leave of Court first had and obtained, amends its answer and denies and alleges as follows:

I.

Admits that defendant owned that certain Plymouth automobile designated by serial number USA 142857.

II.

Denies that at the time of the accident John E. Hadley was acting within the course and scope of his employment by the United States of America.

III.

Denies that the United States of America, acting by and through John E. Hadley, was driving and operating the aforesaid Plymouth automobile.

Wherefore defendant prays that the complaint be dismissed and that defendant have its costs incurred herein.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed June 22, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 28th day of July, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Causes.]

No. 27694 Civil

No. 27732 Civil

TRIAL

These cases, heretofore having been consolidated for purposes of trial, came on regularly this day for trial before the Court sitting without a jury. Paul Richard, Esq., was present on behalf of the plaintiff, and Daniel Deasy, Esq., Assistant U. S. Attorney, was present on behalf of the defendant. Harold E. Wibye, Nils Wibye and Ernest H. Schoening were sworn and testified on behalf of the plaintiff, and Mr. Richard introduced Plaintiff's Exhibits 1 to 11, inclusive, which were admitted in evidence. Edna G. Fipps was sworn and testified on behalf of the defendant. The hour of adjournment having arrived, the Court Ordered the further trial of these cases continued to July 29, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 29th day of July, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Causes.]

No. 27694 Civil

No. 27732 Civil

FURTHER TRIAL—ORDERED CAUSE BE
SUBMITTED ON BRIEFS

The parties hereto being present as heretofore, the further trial of these cases was resumed. Lloyd D. Fisher was sworn and testified on behalf of the plaintiff, and Mr. Richard introduced Plaintiff's Exhibits 12 to 22, inclusive, which were admitted in evidence. Both sides thereupon rested. After hearing from the attorneys herein, it is Ordered that this cause be submitted on briefs to be filed in 15, 15 and 5 days. Further Ordered that these cases be continued to September 12, 1949, for submission.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Wednesday, the 14th day of December, in the
year of our Lord one thousand nine hundred and
forty-nine.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Causes.]

No. 27732 Civil

No. 27694 Civil

ORDER MATTER BE SUBMITTED

The two above-entitled cases came on regularly
this day for further hearing. After hearing Paul
Richard, Esq., for plaintiff, and R. Scholz, Esq., As-
sistant U. S. Attorney, for the United States, it is
Ordered that this matter be submitted.

In the United States District Court for the Northern
District of California, Southern Division

Consolidated Cases No. 27732 and No. 27694-G

HAROLD WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NIELS K. WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

RICHARD NICHOLS,

ALLARD & WILLIAMS,

Attorneys for Plaintiffs.

FRANK J. HENNESSY,

United States Attorney,

Attorney for Defendant.

OPINION

Goodman, District Judge.

In these two consolidated actions for damages for personal injuries brought under the Federal Tort Claims Act, (60 Stat. 843; 28 USC 931, et seq.), the liability of the United States depends

upon whether John E. Hadley, a civilian employee of the Stock Control Division of the United States Quartermaster Corp., was acting "within the scope of his office or employment," at the time the government automobile he was driving struck that of the plaintiffs.

The Facts

The evidence at the trial was substantially as follows:

Hadley's duties required him to travel up and down the west coast of the United States, visiting various Quartermaster Depots and performing certain work there. His traveling was done in a government automobile. His work schedule for November, 1946, was introduced in evidence, from which it appeared that it was his duty to proceed from Seattle, Washington, to the Stockton Quartermaster Depot, located at Lathrop, near Stockton, in the San Joaquin Valley, California. The schedule also called for certain days to be spent by him at Lathrop. It also provided for a travel period, upon completion of his assignment at Lathrop, en route back to Fort Lewis, Washington, near Seattle, at which place he was scheduled to arrive on November 11th.

On the night of Thursday, November 7, Hadley telephoned from Lathrop to his mother, Mrs. Edna Fipps, who lived in San Francisco, and informed her that he would leave Lathrop on Friday and drive to San Francisco for the purpose of having dinner with her Friday evening, on his way back to Fort

Lewis, and also for the purpose, incidentally, of cashing some checks. On Friday afternoon, while en route from Lathrop to San Francisco over highway No. 50, at a point near Dublin, in the County of Alameda, Hadley's car careened over onto the wrong side of the road and crashed into the automobile in which the plaintiffs were riding at the time. Hadley was instantly killed and plaintiffs each suffered severe and permanent injuries. That plaintiffs' injuries were caused by negligence of Hadley is undisputed.

The distance from Lathrop, California, to Fort Lewis, Washington, is approximately 900 miles. At the time of the accident, Hadley had only proceeded a short distance on the long trip ahead of him. The coast route through San Francisco, which he elected to take, is approximately 60 miles further than the inland route from Lathrop through Sacramento, California, to Seattle.

Discussion

Under California law, proof of car ownership gives rise to the inference that an employee of the owner, in possession of the owner's car, is on the business of the owner. Plaintiffs contend that this inference amounts to prima facie proof that Hadley was acting within the scope of his employment by the United States at the time of the accident.¹ We

¹In *Murphy v. U. S.*, 79 Fed. Supp. 925, Judge Lemmon of this Court held the California inference to be pertinent in an action under the Tort Claims

may pass this question inasmuch as other admissible evidence establishes liability.

Hadley's mother was called as a government witness and her hearsay testimony as to the telephone conversation with her son was elicited during her examination. Both plaintiffs and the government have advantaged themselves of the testimony, hearsay though it was, each interpreting it favorably to their or its cause and neither side raised any question as to its admissibility. Because of the importance of this testimony in determining whether Hadley's trip to San Francisco was the first leg of his journey back to Seattle or a distinctly personal side trip, we have conducted independent research and are satisfied that the telephone conversation is admissible. This is so because it falls within a well-recognized exception to the hearsay rule, namely, the so-called "state of mind exception." The rationale of this exception is that a person's own statement of a presently existing state of mind, made in a natural and unsuspecting manner, is

Act. The U. S. Court of Appeals of the Fifth Circuit in *Hubsch v. U. S.*, 174 F. 2d 7, held a comparable inference under Florida law to be insufficient proof of liability of the United States under the Act, but the Supreme Court granted certiorari in the case on Oct. 10, 1949, U. S. . . . , and on Dec. 19, 1949, before argument, remanded the cause to the District Court for the purpose of approving or disapproving a compromise settlement pursuant to §2677 of Title 28 USC. Thus the question posed has not been determined by the Supreme Court.

proper evidence with respect to a design or intent to perform a specific act. It is clear that Hadley's statement to his mother was a completely unrehearsed and spontaneous announcement of his plan, intent and purpose of returning to Fort Lewis, Washington, via San Francisco. His mother's testimony as to such statement was therefore admissible. *Mutual Life Insurance Company v. Hillmon*, 145 U. S. 285. See, also, note 113 A.L.R. 268; 3 Wigmore on Evidence, 2nd Ed. Section 1725, page 696.

The prime legal issue which the Court is required to resolve is whether, in proceeding from Lathrop to Fort Lewis, Washington, there was such a deviation from the route of return to Fort Lewis as would take Hadley outside the scope of his employment and put him on his own business rather than that of the government. As to this, it is sufficient to say that no specific travel route was prescribed by the government for Hadley to follow. It is evident from the nature of the itinerary that the choice of routes was his own. It was only required that after finishing his labors at Lathrop, Hadley was to report to Fort Lewis, Washington, not later than a date fixed. After leaving Lathrop, Hadley was pursuing a route which would take him to Fort Lewis without the necessity of retracing any of the distance covered or of even returning to the so-called inland route, via Sacramento, to Fort Lewis. Therefore, the fair and just conclusion is that, after leaving Lathrop, Hadley was simultaneously upon the government's business and satisfying his own

desire to visit his mother in San Francisco on the way.

Decisions of the California Courts, which, our research reveals, are not untypical of the law generally, clearly indicate that where a deviation from the main travel route is slight and merely involves a choice of routes, it is not sufficient to take an employee out of the scope of his employment. The rule appears to be that "where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master." *Ryan v. Farrell*, 208 Cal. 200 (1929). See also, *Westberg v. Willde*, 14 Cal. 2d 360 (1939); *Cain v. Marquez*, 31 Cal. App. 2d 430 (1939); *Kruse v. White Brothers*, 81 Cal. App. 86 (1927); *Dennis v. Miller Automobile Company*, 73 Cal. App. 293 (1925); *Montgomery v. Hutchins*, 118 F. 2d 661 (9th Cir. 1941). I hold that Hadley was within the scope of his employment at the time of the accident.

Damages

Harold Wibye. As a result of the accident, plaintiff Harold Wibye suffered a cerebral concussion resulting in loss of vision in his left eye and severe headaches, wrenching of the neck and upper back, with post traumatic parascapular myositis bilater-

ally, and other lacerations, abrasions and nervous shock. As the evidence showed, he was unable to follow any occupation for the 141 weeks between the accident and the trial. Medical testimony was that he would need further hospitalization for treatment of his neck and that further repairs to his knee, which had been severely lacerated, were required. The medical proof further showed that the injuries are of a permanent nature and that Harold Wibye will never be fit to follow his occupation. He was 40 years of age, and a superintendent of building construction, earning approximately \$125.00 per week at the time of the accident. Lost earnings amount to some \$17,625.00 and medical and hospital expenses were approximately \$2,160.00. After taking into account the nature of the injuries, the age of this plaintiff, his reasonable life expectancy, his lost earnings and medical expenses and the present value of his future loss of earnings, I have concluded that a proper award should be the sum of \$45,000.00.

Niels K. Wibye, Niels K. Wibye suffered more severe injuries than his brother. He also had a cerebral concussion and in addition a fracture of both hips and his right knee, resulting in considerable limitation of motion thereof. In addition, he suffered injury of the tendons of the right wrist and other deep and painful lacerations. He was confined to the hospital for many months, where he underwent surgery in an attempt to repair the fractures of the hips and knee. His injuries are

permanent in character. At the time of the accident, he was 41 years of age, and was a carpenter foreman, earning approximately \$100.00 a week. Loss of earnings at the time of the trial was \$14,000.00; medical and hospital expenses amounted to \$4,505.56. Taking into account his age, occupation, lost earnings, medical expenses, present value of his future loss of earnings, his reasonable life expectancy, and the nature of his injuries, my finding is that an award of \$60,000.00 would be proper.

Judgment may therefore be entered in favor of Niels K. Wibye for the sum of \$60,000.00; and in favor of Harold Wibye for \$45,000.00, upon findings of fact and conclusions of law to be presented in accordance with the Rules.

Dated: December 22, 1949.

/s/ LOUIS GOODMAN,
United States District Judge.

[Endorsed]: Filed December 22, 1949.

[Title of District Court and Causes.]

Consolidated Cases No. 27732 and No. 27694-G

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action coming on regularly for hearing and trial on the 28th day of July, 1949, before the above-entitled Court, upon the complaints

of plaintiffs and the answers of the defendant United States of America, the Hon. Louis E. Goodman presiding, and the Court sitting without a jury; Messrs. Nichols, Richard, Allard & Williams and John D. Den-Dulk, Esq., and Eugene K. Sturgis, Esq., appearing as counsel for plaintiff Harold Wibye and Messrs. Nichols, Richard, Allard & Williams appearing as counsel for plaintiff Niels K. Wibye, by Paul B. Richard, Esq., and the United States Attorney General's office, by Daniel C. Deasy, Esq., appearing as counsel for defendant United States of America, and evidence both oral and documentary being offered and received by the Court, and the Court having heard the testimony, and the evidence having been closed and said cause having been submitted to the Court for its decision, and the Court having been fully advised in the premises, comes now the Court and renders the following Findings of Fact:

Findings of Fact

I.

That by an order duly made by the above-entitled Court and entered on the 3rd day of May, 1948, the above-entitled and numbered actions were consolidated for the purposes of the trial and subsequent proceedings pursuant to a stipulation made and entered into by counsel for the respective parties.

II.

That said actions were prosecuted pursuant to the provisions of that certain Act of Congress of

the United States of America, more generally known and designated as Federal Tort Claims Act (60 Stat. 843; 28 U.S.C. 931, et seq.).

III.

That it is true that on or about the 8th day of November, 1946, John E. Hadley, now deceased, was the agent, servant and employee of said defendant United States of America, and was on said date acting within the course and scope of his employment upon orders requiring him to visit various quartermaster depots and perform certain work there; that it is true that in accordance with said John E. Hadley's work schedule, it was his duty to proceed from Seattle, Washington, to the Stockton Quartermaster Depot, located at Lathrop, California, and upon completion of his assignment at Lathrop, California, to return to Fort Lewis, Washington, at which place he was scheduled to arrive on the 11th day of November, 1946; that it is true that on said 8th day of November, 1946, said John E. Hadley was operating and driving a certain Plymouth automobile owned by said defendant United States of America.

IV.

That it is true that on or about said 8th day of November, 1946, plaintiff Niels K. Wibye was riding as a guest in a certain Oldsmobile automobile, then and there being driven by plaintiff Harold Wibye; that said automobile was being driven in a general easterly direction on State Route No. 513,

at a point thereon approximately 2/10ths of a mile westerly of the intersection of State Route 513 with Dublin Road, in the County of Alameda, State of California; that at said time and place said defendant United States of America, acting by and through its agent, servant and employee John E. Hadley, now deceased, and John E. Hadley, now deceased, were then and there driving and operating a certain Plymouth automobile in a general westerly direction upon said State Route No. 513 at said location as aforesaid; that at said time and place defendant United States of America, acting by and through its agent, servant and employee, John E. Hadley, now deceased, did then and there so carelessly and negligently drive, operate and control said Plymouth automobile as to cause it to and it did violently collide with the automobile in which plaintiffs were riding as aforesaid.

V.

That it is true that as a direct and proximate result of the carelessness and negligence of said defendant, as aforesaid, plaintiff Niels K. Wibye sustained the following personal injuries:

Cerebral concussion; fracture of both hips; fracture of the right knee resulting in considerable limitation of motion, and straining and spraining of the ligamentous tendons and tissues in the vicinity of said knee joint; deep laceration to the right wrist, severing three extensor tendons, resulting in limitation of motion in said wrist; deep laceration of the upper left arm requiring suturing and resulting in

partial severance of the tricept tendon; deep laceration of the left forearm requiring suturing; deep laceration of the left thumb requiring suturing; deep laceration in the left arm pit requiring suturing; severe blow to the mouth requiring the extraction of all of his upper teeth; severe nervous shock; multiple bruises and abrasions about said plaintiff's body generally; that all of the above injuries are permanent in character; that it is true that at the time of said accident plaintiff Niels K. Wibye was forty-one years of age and was a carpenter foreman, earning approximately \$100.00 a week; that it is true that the loss of earnings at the time of trial was in the sum of \$14,000.00; that it is true that plaintiff incurred obligations as and for hospitalization, physicians and surgeons services, general nursing care, X-rays, and medications in the sum of \$4,505.56; that said sum was the reasonable value of said services rendered; that it is true that plaintiff will continue to require further medical and hospital care and treatment.

VI.

That it is true that as a direct and proximate result of the carelessness and negligence of said defendant, as aforesaid, plaintiff Harold Wibye sustained the following personal injuries, to wit:

Severe cerebral concussion; loss of vision of the left eye, severe wrenching of the neck and upper back with post traumatic parascapular myositis bilaterally; lacerations of the anterior of the left patella requiring suturing; lacerations across the anterior of the right patella requiring suturing;

severe straining and spraining of the cervical area of the spine with traumatic cervical neuritis; severe injury to the internal organs of said plaintiff; cuts and abrasions about the face; deep contusions of the left chest and shoulder; that all of the above injuries are permanent in character; that at the time of said accident said Harold Wibye was forty years of age, and was superintendent of building construction, earning approximately \$125.00 per week; that at the time of trial, said loss of earnings were approximately \$17,625.00; that it is true that plaintiff has incurred obligations as and for hospitalization, physicians and surgeons services, general nursing care, X-rays, and medications in the sum of \$2,160.00; that said sum was the reasonable value of said services rendered; that it is true that plaintiff will require further hospitalization and medical treatment for his leg and knee.

VII.

That except as herein expressly found to the contrary, all of the allegations contained in each of plaintiffs' complaints are true, and except as herein expressly found to the contrary, all of the affirmative allegations of defendant's answers to each of said complaints are untrue.

From the foregoing findings of fact the Court makes the following conclusions of law, to wit:

Conclusions of Law

I.

That each of said plaintiffs are entitled to recover judgment against defendant United States of America herein.

II.

That judgment should be entered in favor of plaintiff Niels K. Wibye (Action No. 27694-G) in the sum of \$60,000.00, and in favor of Harold Wibye (Action No. 27732) in the sum of \$45,000.00, and that plaintiffs recover their costs of suit herein; and that judgment be entered accordingly.

Dated: January 5, 1950.

/s/ LOUIS GOODMAN,
Judge.

Affidavit of Service by Mail attached.

Lodged December 28, 1949.

[Endorsed]: Filed January 5, 1950.

In the District Court of the United States for the
Northern District of California, Southern Division.

Consolidated Cases No. 27732 and No. 27694-G

HAROLD WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NIELS K. WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action coming on regularly for hearing and trial on the 28th day of July, 1949, before the above-entitled Court, upon the complaints of plaintiffs and the answers of the defendant United States of America, the Hon. Louis E. Goodman presiding, and the Court sitting without a jury; Messrs. Nichols, Richard, Allard & Williams and John D. Den-Dulk, Esq., and Eugene K. Sturgis, Esq., appearing as counsel for plaintiff Harold Wibye and Messrs. Nichols, Richard, Allard & Williams appearing as counsel for plaintiff Niels K. Wibye, by Paul B. Richard, Esq.; and the United States Attorney General's office, by Daniel C. Deasy, Esq., appearing as counsel for defendant United

States of America, and evidence having been closed and said cause having been fully submitted to the Court for its decision, and the Court having made findings of fact and having rendered its conclusions of law therein, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff Niels K. Wibye (Action No. 27694-G) be awarded the sum of \$60,000.00, and that plaintiff Harold Wibye (Action No. 27732) be awarded the sum of \$45,000.00, and their costs of suit, against the defendant United States of America.

Done in Open Court this 5th day of January, 1950.

/s/ LOUIS GOODMAN,
Judge.

Lodged December 28, 1949.

[Endorsed]: Filed January 5, 1950.

[Title of District Court and Cause.]

No. 27694-G

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that judgment entered against it and in favor of Niels K. Wibye on January 6, 1950.

Dated: February 7, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for Defendant-
Appellant.

[Endorsed]: Filed February 7, 1950.

[Title of District Court and Cause.]

No. 27732-H

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that judgment entered against it and in favor of Harold Wibye on January 6, 1950.

February 7, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for Defendant-
Appellant.

[Endorsed]: Filed February 7, 1950.

[Title of District Court and Cause.]

No. 27694-G

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the defendant, appellant herein, may have to and including the 5th day of May, 1950, to file the record on appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated: March 22, 1950.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed March 22, 1950.

[Title of District Court and Cause.]

No. 27732-H

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the defendant, appellant herein, may have to and including the 5th day of May, 1950, to file the record on appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated: March 22, 1950.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed March 22, 1950.

[Title of District Court and Causes.]

Consolidated Cases No. 27732-H and No. 27694-G

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

That the trial Court erred.

I.

In finding that John E. Hadley was acting within the course and scope of his employment as an agent, servant or employee of the United States of America at the time and date of the accident.

II.

That John E. Hadley was negligent.

III.

That the evidence of the mother of John E. Hadley was sufficient to establish that John E. Hadley was on Government business at the time of the accident.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for Defendant,
United States of America.

[Endorsed]: Filed April 18, 1950.

[Title of District Court and Causes.]

Consolidated Cases No. 27732-H and No. 27694-G

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above-entitled Court, and to
Messrs. Nichols, Richard & Allard, Attorneys
for Plaintiffs:

The defendant, United States of America, by its
attorney herein, hereby designates for inclusion in
the transcript of record upon appeal, the complete
record, and all the proceedings and evidence in the
action.

Dated: April 20, 1950.

/s/ FRANK J. HENNESSY,

United States Attorney, Attorney for Defendant,
United States of America.

[Endorsed]: Filed April 20, 1950.

[Title of District Court and Causes.]

No. 27694 G and No. 27732-H

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court
of the United States for the Northern District of
California, do hereby certify that the foregoing doc-
uments and accompanying exhibits listed below, are

the originals filed in this Court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled consolidated cases, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

In Case No. 27694-G

Complaint

Answer to Complaint

Amended Answer

Minute Order of July 28, 1949

—Trial

Minute Order of July 29, 1949

—Further Trial

Ordered Cause Be Submitted on Briefs
December 14, 1949

—Ordered Matter Be Submitted

Opinion

Findings of Fact and Conclusions of Law
Judgment

Notice of Appeal

Order Extending Time to Docket

Statement of Points to Be Relied Upon on
Appeal

Designation of Contents of Record on Appeal

In Case No. 27732-H

Complaint

Answer to Complaint

Amended Answer

Notice of Appeal

Order Extending Time to Docket

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

In Witness Whereof, I have hereunto set my hand
and affixed the seal of said District Court this 2nd
day of May, A. D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

In the District Court of the United States for the
Northern District of California, Southern Division

Before: Hon. Louis E. Goodman,
Judge.

Consolidated Cases No. 27732-H-No. 27694 G

NIELS K. WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

HAROLD WIBYE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

July 28th and 29th, 1949

Appearances:

For the Plaintiff, Niels K. Wibye—

EUGENE K. STURGIS,

JOHN D. DEN-DULK,

NICHOLS, RICHARD, ALLARD &
WILLIAMS,

By PAUL B. RICHARDS, ESQ.

For Plaintiff Harold Wibye—

NICHOLS, RICHARD, ALLARD &
WILLIAMS.

For United States of America, the Defendant—

DANIEL DEASY,

Assistant United States Attorney.

The Clerk: Wibye versus United States.

Mr. Richard: Ready.

Mr. Deasy: Ready, your Honor.

The Court: You may proceed.

Mr. Richard: If your Honor please, you may recall that when the matter was called about six weeks ago, permission was given to file amended answers on certain issues. In other words, in the original pleadings, in the original answers that were filed, there was no denial of scope of employment of the person driving the government car. Your Honor at that time gave permission for the defendant to file an amended answer—an amendment to the answer—which has been done in both cases.

Now, I notice—I don't know why—but the language of the amendments in the two cases is somewhat different. Calling your attention, if your Honor please, to Number 27694, the Niels Wibye case, in which it is denied that John E. Hadley was at the time of the accident acting within the course or scope of his employment, or was an agent, servant, or employee of the defendant. Now, the

other answer simply denies at the time of the accident he was acting within the course and scope of his employment, the United States of America.

The understanding, I believe—and I think Mr. Deasy and I have agreed—is that since the only denial is that Hadley was acting within the course of his employment at the time—in other words, that there is no denial—that there was a government—that, of course, is admitted.

The Court: Or that the driver was in the government employ?

Mr. Richard: He was a government employee. The only issue is of the course and scope of employment.

Mr. Deasy: That's right. I can't account for the difference in language in amending those answers.

Mr. Richard: Mr. Harold Wibye, would you take the stand?

HAROLD E. WIBYE

called by the plaintiff; sworn.

Direct Examination

By Mr. Richard:

Q. Give your full name.

A. Harold E. Wibye.

Q. Where do you reside?

A. 1628 Brush Street, Oakland, California.

Q. On the 8th of November, 1946, the day of

(Testimony of Harold E. Wibye.)

the accident we are to discuss here, were you living at the same address?

A. No. At that time I was living at 4066 Patterson and working in San Leandro.

Q. That Patterson Street address is also in Oakland? A. Yes. [3*]

Q. What is your age? A. 43.

Q. Are you married or single?

A. Yes, sir; I am married.

Q. Do you have children? A. One.

Q. Now, on the 8th day of November, 1946, you were involved in an automobile accident, were you not? A. Yes, sir.

Q. Where, generally speaking, did that accident occur?

A. That accident happened on the down-grade of Pergola Hill, approximately six miles from San Leandro, or between the first left hand turn and in the straight-a-way before entering the right-hand turn, about a quarter way down the hill.

Q. This Pergola Hill that you speak of is a hill that is located—that is referred to very often by location? A. Yes, sir.

Q. Now, the highway that you were on is the main highway running between the City of Oakland down through Castro Valley, on down to Livermore and Tracy? A. That's right.

Q. That is correct, is it not? A. Yes, sir.

Q. And were you operating one of the automobiles involved in the accident? [4]

* Page numbering appearing at top of page of original certified Reporter's Transcript.

(Testimony of Harold E. Wibye.)

A. Yes, sir.

Q. What kind of a car were you operating, sir?

A. A 1941 Oldsmobile business coupe.

Q. Were you the owner of that automobile?

A. No, sir.

Q. Who was the owner of that automobile?

A. My brother, N. K. Wibye.

Q. And N. K. Wibye is the Niels——

A. Niels K. Wibye.

Q. (Continuing): ——who is the plaintiff in one of the actions here? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. He is your brother? A. Yes, sir.

Q. Will you tell us approximately the time of day or night the accident happened?

A. I believe it was between 4:35 and 4:40.

Q. In the afternoon?

A. In the afternoon of Friday.

Q. What was the condition of the weather on that afternoon, Mr. Wibye? A. Clear.

Q. Now, generally speaking, in what direction does that [5] highway run?

A. I would say east and west; west to Oakland and east to Bakersfield.

Q. And the direction in which you were traveling was which way? A. East.

Q. What was your destination?

A. Bakersfield, California.

Q. Where had you come from? Where had you started out that afternoon?

(Testimony of Harold E. Wibye.)

A. We had left 151 Street and San Leandro. In other words, it was the site of our job.

Q. That you were working on?

A. I beg your pardon?

Q. The site of the job that you were working on at the time? A. Yes, sir.

Q. Now, you said "151 Street." That is 151st Avenue, is it not?

A. Approximately 151st Avenue.

Q. All right. And you were going generally in an easterly direction? A. Yes, sir.

Q. At the location where the accident took place, how many lanes or traveled portions—how many lanes for automobiles are there? [6]

A. Three lanes at the location of the accident.

Q. Are those lanes in anywise marked by white lines or otherwise?

A. They are clearly defined by two white lines dividing the three lanes, single lanes.

Q. Three lanes. Now, in the automobile at the time were who? A. My brother and I.

Q. All right. On the last quarter of a mile prior to the happening of this accident, in which lane of travel was your car being operated?

A. The extreme right hand lane.

Q. Can you tell me whether or not at all times in that last quarter of a mile clear up to the time of the happening of the accident itself, your car was in any other lane upon the highway?

A. No, it was always in the extreme right-hand lane.

(Testimony of Harold E. Wibye.)

Q. And at the time of the happening of the accident likewise? A. I beg your pardon?

Q. At the time of the happening of the accident, you were in which lane?

A. I was within six inches of the edge of the black top.

Q. When you speak of six inches of the edge, you are referring to which edge?

A. That is the right-hand edge. [7]

Q. The black top is the—— A. Macadam.

Q. The traveled main portion of the highway?

A. Yes, sir.

Q. With this shoulder that you speak of on the side? A. That is correct.

Q. And, in that last quarter of a mile, will you give me your best judgment as to the highest speed that you traveled?

A. Approximately 50 miles an hour.

Q. Now, you were involved in a collision with another automobile, were you not?

A. Yes, sir.

Q. Did you see that automobile before the collision? A. Yes, I did.

Q. Which direction was it traveling, sir?

A. It was traveling west on Highway 50.

Q. In the opposite direction? A. Yes, sir.

Q. When you first observed it, approximately how far distant was it?

A. I believe it was about 120 to 150 feet from me.

Q. When you first noticed it at all?

(Testimony of Harold E. Wibye.)

A. Yes, sir.

Q. Was there some traffic upon the highway at about that time? [S]

A. Well, I had only passed one car traveling in a westerly direction on the hill coming down. Traffic was light, I would say, at that time.

Q. Did you notice, generally coming from the opposite direction, some automobiles?

A. A few.

Q. About the time of the accident?

A. Yes, there were very few cars at that time.

Q. The first time you noticed this automobile as such, you would say it was a hundred twenty or twenty-five feet away? A. Yes, sir.

Q. What lane of traffic was it in when you first noticed it?

A. In the extreme right-hand lane coming toward me.

Q. So that the middle or center lane separated the two cars? A. Yes, sir.

Q. Were you able at any time to estimate the speed at which that automobile was traveling?

A. I would say he was traveling approximately the same speed I was.

Q. Now, after first noticing that automobile, will you tell us the course that it pursued, just what you saw it do up to the time this collision took place?

A. Well, when I first observed the car, it was in the extreme right-hand lane; and upon crossing about 35 or 40 feet, it gradually veered about two

(Testimony of Harold E. Wibye.)

feet into the center lane [9] crossing the white line about two feet; and then it made a sharp left-hand turn, cutting clear across the center lane and striking the inside of the right front wheel of our automobile.

Q. Now, having observed——

The Court: The right front wheel?

The Witness: Right front wheel.

Q. You were traveling eastward?

A. I was traveling east.

Q. (By Mr. Richard): In other words, he cut across in front of you and the main contact was on your right-hand side?

The Court: In front of you. I see.

The Witness: Yes. He practically cut clear in front of me and hit the right-hand front wheel.

Q. (By Mr. Richard): When you observed the car deviate and turn from its lane towards you, what, if anything, did you do?

A. Applied the brakes.

Q. Was your car traveling when the accident happened? A. Traveling?

Q. Yes.

The Court: Was your car moving?

A. Yes, sir.

Q. (By Mr. Richard): Your car hadn't been brought to a stop? A. No, sir. [10]

Q. Did you have any judgment as to the speed of your car at the moment of the accident?

A. No, sir. I don't know how much brakeage

(Testimony of Harold E. Wibye.)

I had on the car at the time of applying the brake.

Q. I see.

A. There was no swerve to my car. I didn't apply the brake very heavily, but it was enough to leave a slight tire mark on the black top.

Q. On the pavement? A. Yes.

Q. Did you see that mark upon the pavement yourself, or is that something you have been told since?

A. No, sir; I saw it in a picture of the accident.

Q. I see; but you did not see it upon the highway yourself? A. No.

Q. All right. Now, what portion, if you know, of the other car was involved in a collision with the right front of your car?

A. His right front end.

Q. All right. Now, upon the happening of the accident itself, were you or were you not rendered unconscious?

A. Upon the impact of the accident?

Q. Yes. A. Yes, sir.

Q. You were rendered unconscious? [11]

A. Yes, sir.

Q. Did you have any recollection of anything that happened at the scene of the accident after the actual collision?

A. No, sir; nothing at all.

Q. Do you remember being transported in an ambulance from the scene of the accident?

A. No, sir.

(Testimony of Harold E. Wibye.)

Q. Do you have any recollection of being at Fairmont Hospital? A. No, sir; I don't.

Q. Well, do you have any recollection at all of being anywhere until you were in a hospital in Oakland?

The Court: I think what he means is: When did you recover consciousness?

Q. (By Mr. Richard): When did you come to? That's right.

A. In my bed in the hospital room.

Q. What hospital was it?

A. Providence Hospital, in Oakland.

Q. Do you know whether or not that was the same day or night of the accident?

A. No, I don't.

Q. That you came to? A. No.

Q. You do not? A. No, sir. [12]

Q. All right. Now, did you receive personal injuries in that accident, Mr. Wibye?

A. Yes, sir.

Q. Will you, generally speaking, starting right at the top of your head and going right down, detail to us the injuries that you yourself received?

A. Yes, sir. In the accident, I took the impact on three points of my body, generally. First was my head and my forehead.

Q. You are indicating the left side of your head?

A. Yes, my forehead was shattered from my hair line through my eyebrow, and the nerve was cut and shattered. My head had broken the windshield

(Testimony of Harold E. Wibye.)

out, and I have a slight indentation of my forehead here, and a roughness of the eyebrow line.

Q. You are indicating the left side of your forehead, just above the left eyebrow?

A. That is the left side. Since that time, I have had severe headaches through my left temple and a numbness of the crash area on my forehead, possibly over a period of a year and a half since the accident. Approximately two years and nine months have elapsed and the numbness has gradually become cleared up and that has become sensitive in that area. There is no numbness in that area at the present time. [13]

Over a period of possibly two years, I had severe headaches, and any exertion such as walking up a stairs or standing for a while, movement, or getting up out of the bed quickly, or from a chair, causes dizziness and blackouts.

I have had severe pains and cramps, more or less of a measure, and a swelling at the base of my brain on both sides; and also a lump on the right-hand cord of my neck.

Over a period of possibly two years, four months, I have had intermittent swelling of the cords, in these cords of my neck and at the base of the brain and I believe that Dr. Fisher recommended that I take heat and massage treatments for it; and over a period of a year and a half, I believe I have had fifty heat and massage treatments at 520 Sutter Massage Parlor, and also eight or ten treatments in Oakland, California, with a physiotherapist.

(Testimony of Harold E. Wibye.)

The heat and massage was very agreeable to the neck; the swelling goes down—and although it goes down, it is down for a week or two and then it gradually creeps back up in my neck, and I sit here in court today with a swelling in my neck. The left-hand is solid. There is not as much swelling in this side, but I do have pressure feeling and pains there at the base of my brain right now.

Cramps set in at the base of my brain and fluctuate—intermittent cramps, which will start up here, possibly, [14] and tighten up and terminate in shooting pains, more or less a shooting pain, just traveling directly upward into my head.

In the crash, somehow or other, the ring was torn off this steering wheel and the spokes evidently lay each side on my chest; and in the impact, the steering post was folded up into the windshield and the spokes of the steering wheel were bent down vertical, parallel to the windshield; and while in the hospital, I had severe pains in my chest cavity; and after leaving the hospital, Dr. Fisher put more or less of a chest—it looked like a brassiere—a harness around my chest to alleviate the pain in my chest. I believe I carried my left arm in a sling for about three weeks due to torn ligaments in my left arm.

I have cramps in the thoracic section of my back and also intermittent or fluctuating shooting pains that start in the region of the back and terminate somewhere in the front, possibly somewhere through the chest cavity.

(Testimony of Harold E. Wibye.)

While in the hospital, my vision was very poor. I couldn't even read the headlines of the newspaper; and since that time, my vision has been fluctuating from good to bad.

Q. Any difficulty with the ears?

A. I have a constant ringing in my ears which has never stopped since the accident. I sit here now with the ringing [15] in my ears. It is about as loud as a steam valve popping on a hot water system radiator. It is constant.

At times, I have a nausea to my stomach, or cramping such as you have when you want to vomit and still I have no vomiting. Instead of vomiting, my salivary glands flow and—well, a lot of times, I am in a position where I can't spit and my mouth feels practically full of saliva. On one occasion, the smell of food has caused me to vomit and nauseated me to the extent that I couldn't eat for several days. I don't know what the situation was.

Over a period of two years, I lacked the ability to sleep, and I received sedatives from Dr. Fisher, Dr. Shock, Dr. Libbey, Dr. Norcross.

Q. Any other doctors that prescribed sedatives other than the ones you have mentioned, so far as you can recall?

A. I have been to Dr. Weisenfeld and Dr. Johns; and my last visit to Dr. Fisher was—oh, some time in June.

Q. Of this year?

A. Of this year. And at that time, I was feel-

(Testimony of Harold E. Wibye.)

ing very—I was feeling very good. I had felt good for a period of three weeks; and in giving me a check-up, I was put through the paces of a left-hand turn, a right-hand turn as far as I could turn, and my head was forced over to the right to a full 90 degrees in a forward bend and a backward bend; and within a half hour after I left his [16] office, swelling set in in my neck and a throbbing of the brain, just like beating on it with a hammer. I could feel the pulse beat every beat of my heart; and I went back to Dr. Fisher the next morning for some sedative or pain pills. I don't know what they were. They were very effective in killing the pain.

Since that time, which was in June, I have had the swelling in my neck, and come here to court today with it still in the base of my brain.

Q. Mr. Wibye, was there any injury down in your low back? When you spoke of these pains that go through the chest, was there any injury to the low back?

A. No, sir. I have no injury below the waistline, with the exception of about eight or twelve inches of lacerations upon my knees where my knees were driven in the dashboard.

Q. Was there any suture performed?

A. Yes, sir. I believe there were about forty stitches in my knees.

Q. Do you have any recollection of the sutures being placed there?

(Testimony of Harold E. Wibye.)

A. No, sir; I have no recollection until the time I came to in my hospital bed.

Q. And that had already been performed?

A. That had already been performed.

Q. Now, there is a scar there? [17]

A. Yes, sir; I have scars on the right——

Q. I—— A. I beg your pardon?

Q. On the left knee?

A. On the right and the left knee; and also, I think there was some break or fracture which caused a raising of the left kneecap.

Q. Will you just show to the Court and counsel the scar that you have there on the left knee?

A. You will have to look at both knees to see the different in the knee.

Q. In other words, you got a knob up here, you mean?

A. Yes, sir. I can't get down on my knees because that point is the only point of contact, and that knee is very sensitive. I can get down on this knee (indicating); but this one is very sensitive that way.

Q. The suture was in the left knee?

A. I believe about forty stitches; about a five or six-inch cut around here in a half moon; and then this cut about three inches and a half across there (indicating).

Q. Now, the areas that you notice upon both knees there that are discolored, were the result of this accident? A. Yes, sir.

(Testimony of Harold E. Wibye.)

Q. They did not exist before?

A. No, sir. [18]

Q. You say you were unable to get down upon the left knee?

A. Yes, sir. I can't put my——

The Court: You mean you can't kneel on it?

A. No, I have fully a 90 bend of my knees—rather of my legs—but I have a very painful kneecap.

Q. (By Mr. Richard): What about the right knee? Are you able to get down on it?

A. Yes, sir; that is normal. It is very sensitive. You can see the incisions directly across the kneecap, and with a pad, I can get down on it. This knee, I can't (indicating).

Q. Now, have you outlined to us generally the injuries that you received in this accident, Mr. Wibye? Of course, your doctor will be here to testify also.

Now, will you tell us, after the accident for how long a period you were confined to Providence Hospital?

A. I was confined to the Providence Hospital for a period of eight days—I believe from November 8, 1946, to about November 16th or 17th, 1946; and then——

Q. Where did you go then?

A. I beg your pardon?

Q. Where did you go from the hospital?

A. I went to—I was hobbling around at that

(Testimony of Harold E. Wibye.)

time, and I had to get some place where I wouldn't have to walk upstairs or bend my knees. I couldn't bend my knees. I left the hospital with stitches in my knee; they had not [19] been removed; and I went to the American Motel.

Q. In Oakland?

A. In Oakland, California.

Q. Where was your family at that time?

A. My wife was at Bakersfield.

Q. Were you able to take care of yourself when you left the hospital and went to the American Motel? A. No, sir.

Q. Did you engage someone to assist you?

A. Yes, sir; I employed some special care.

Q. Was that a male practical nurse?

A. Yes, sir.

Q. How long did he remain with you?

A. Five weeks.

Q. Now, after the end of five weeks, where did you go after leaving—withdraw that. You remained at the Motel how long?

A. I believe a period of ten or fifteen days; and then I moved down to the Providence Hotel.

Q. And this male nurse accompanied you?

A. Yes, sir.

Q. And after a period of being in this hotel, did you finally return to Bakersfield?

A. No, sir; my wife came to Oakland.

Q. Incidentally, you say your wife was down in Bakersfield, [20] but did you have a home down there, a house or an apartment?

(Testimony of Harold E. Wibye.)

A. I had a house trailer.

Q. You had a house trailer? A. Yes, sir.

Q. And that is one of the reasons you did not go down to Bakersfield any sooner than you did, is that right? A. That is correct; yes, sir.

Q. All right. Now, were you in any hospital later on for treatment as a result of the injuries in this accident?

A. Yes, sir. I believe it was on October 25th of 1948, I spent five or six days in Providence Hospital taking traction under observation of Dr. Fisher.

Q. The traction was applied where?

A. The traction—well, they put your head in a halter with a rope and pulleys on it, and——

Q. Well, the traction was applied to the neck?

A. To the neck; yes, sir.

Q. All right; and you were in there for some four or five days? A. Yes, sir.

Q. Now, you spoke of physiotherapy treatments that you had from time to time, you believe numbering about fifty?

A. I would say I had fifty-five in the physiotherapy parlors; and at the same time, after that, in other places, I was taking ultra-violet treatments at home, and electric [21] pad heat at home.

Q. Now, after having this neck stretching and traction upon the neck in the hospital, did Dr. Fisher prescribe any home treatment for you in the way of stretching? A. Yes, sir.

(Testimony of Harold E. Wibye.)

Q. Either before or after you were in the hospital this second time?

A. After I was in the hospital, I continued the traction for a period of about seven days and the swelling was removed, and my neck was in good condition for about four days and the swelling returned, and I used traction again for, I think, fourteen days.

Q. Did you purchase brace of some kind for that purpose?

A. No, I made a head halter and had the weight pulleys at home.

Q. You did that under Dr. Fisher's suggestion and direction, is that right?

A. Yes, sir.

Q. Do you still use that?

A. No, I have not used it since June, about June 1st.

Q. Of this year?

A. Of this year.

Q. Now, you incurred, did you not, as a result of this accident, in connection with your care and treatment, certain obligations, certain bills, for doctors and hospital and [22] ambulance, X-rays, nursing care, and incidentals, is that correct?

A. Yes, sir.

Q. I hand you here a typewritten list and ask you to look over that (handing to witness). Is that a true and correct list?

A. Yes, sir.

Q. You gave those items to determine what made up the list?

A. Yes, sir.

Mr. Richard: Those total \$174.66. Is there any

(Testimony of Harold E. Wibye.)

question there, Mr. Deasy, about any of those items that you want to discuss?

Mr. Deasy: I might want to ask him about it.

Mr. Richard: All right.

If your Honor please, we offer this in evidence. If there is a question of reasonableness——

The Clerk: Exhibit One.

(List of Medical Expenses, Harold Wibye, was received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Richard): Mr. Wibye, at the time of the happening of this accident, what was your business or occupation?

A. I was Superintendent of Construction for the East Bay Construction Company of San Leandro.

Q. Were you actually engaged upon a job at the time of the happening of this accident? I mean, had you worked upon [23] this particular day?

A. Yes, sir.

Q. And for this organization? A. Yes, sir.

Q. At a job, you said, somewhere near 151st Avenue in San Leandro?

A. Yes, sir; in that vicinity.

Q. And, generally speaking, what were your duties, or what did you do on that job?

A. Well, my duties were to expedite the progress of the work; to keep materials on the job for the men; order concrete; and——

Q. Well, you were designated as what, Construction Superintendent?

(Testimony of Harold E. Wibye.)

A. Construction Superintendent.

Q. All right. At the time of the happening of this accident upon this particular job, what was your weekly compensation?

A. My weekly compensation was one twenty-five a week.

Q. Was that gross?

A. That was gross. The net was \$105.30.

Q. Was that for a 40-hour week?

A. That was for a 40-hour week.

Q. In other words, five days a week, six hours per day?

A. Yes, sir. [24]

Q. Now, generally speaking, for the last—oh, say, eight or ten years before the happening of this accident, what had been your business or occupation?

A. Construction work had been my business for the last ten years.

Q. And will you just tell the Court generally and—oh, say, since 1939 or 1940, the type of work and the kind of jobs you have been on?

A. Well, the last job was with the East Bay Construction Company, and I was rated as an Assistant Superintendent at \$125 per week. I just left a job in Bakersfield working for a contractor by the name of O. D. Williams. I was Building Superintendent, and I had the alternative of taking a flat salary of \$150 a week or an hourly basis. Consequently, I took the hourly basis because I had the opportunity to make from \$160 to \$200 per week.

Q. What kind of job was that?

(Testimony of Harold E. Wibye.)

A. I was Superintendent of the Bell Telephone Building at Bakersfield.

Q. That is a new building that was being constructed?

A. It was a new building. I started the building and I finished the building.

Q. And that took approximately how long?

A. Oh, I believe I was there three months on the project. I had come in from Inyokern where I had been working for [25] N.O.T.S.—that is, the Naval Ordnance Test Training *Training* Station, for approximately a year and a half; and my capacity on that job was general carpenter-foreman; and also on another unit, it was Area Superintendent. My salary on that job was \$125 gross. I believe I was there at the Navy base for approximately a year and a half. I was shipped out here from—I was shipped out to the Navy Base from Houston, Texas, where I had just completed a job, I believe with the Brown and Root Construction Company, and I was rated as General Steel Foreman on that job. I had the alternative of taking a base pay of one twenty-five, or an hourly basis; and in preference to the salary, I took the hourly basis because I had the opportunity to make from \$150 to \$200 a week.

Q. And did you make that on that job?

A. Yes, sir; a period of eighteen months.

Q. That was what kind of a job; that is, what was the construction?

(Testimony of Harold E. Wibye.)

A. The construction was concrete and steel. I was General Steel Foreman, and I was installing vertical flood gates on the Brazos River and the Matagorda Bay.

The job prior to that was working for the Tel-Epson Construction Company at Freeport, Assistant Superintendent to Jack Hale, at a salary of \$125 per week, and I worked for the company approximately 14 or 16 months. [26]

Q. This takes us back, then, several years before the happening of this accident?

A. That is back to 1941.

Q. And even before the war, were you engaged in this same line of business?

A. Yes, sir. I worked on locks and dams on the Mississippi River, starting at St. Paul on down the Mississippi River to St. Louis, and I had various jobs, such as carpenter foreman, shop foreman, sheet pile foreman; and at one time when I started out, I started out working as a carpenter under a Carpenter Union card.

The Court: How long have you been married?

A. I beg your pardon?

Q. How long have you been married?

A. Nine years.

Q. And how old is the child?

A. Seven years.

Q. (By Mr. Richard): Generally speaking, for the last eight or ten years before the accident, the things you have detailed, the work that you have

(Testimony of Harold E. Wibye.)

done, and your income or salary would range—is it a fair statement—from one hundred a week up?

A. Oh; yes, sir. My base has been the equivalent of \$125, and running much higher than that. During the work throughout the war, we worked long hours and had the opportunity to make \$200 to \$230 a week. [27]

Q. But even before the war, you had been receiving a base pay in the vicinity of \$125 a week?

A. Yes.

Q. All right, sir. Now, have you done any work of any kind, that is, for remuneration for any pay since the happening of this accident?

A. No, sir. I have received no wages or salary since November 8, 1946. I tried to go to work on two occasions and I just couldn't make it.

Q. What, particularly, Mr. Wibye, upon these occasions that you have endeavored that has prevented you from carrying on work?

A. Well, I tried to go to work for the East Bay Construction Company and I was supposed to supervise the installation of a storm ditch. The ditch was fifteen feet wide and about ten feet deep, and I believe it was about February 10th that I went out to the job and I walked down in the ditch and I, at that time, was still very lame in my left knee, and I believe that some of these stitches had been left in the flesh. The surface stitch had been torn off and I developed two or three boils—or rather infected spots to my knees—which were swelling at

(Testimony of Harold E. Wibye.)

that time, and it was very painful to walk, but still I tried to go to work. In coming out of the ditch—the bank is only about ten feet high—I suffered a slight blackout and dizziness; and also at that time I was still [28] having severe pains between my shoulder blades in my back. I believe I was there three hours and I told the foreman that I was going to give it up, and I never went back to the job.

Q. Then you tried it upon another occasion?

A. Yes, sir. I actually tried to work for about two and a half hours and——

Q. That was upon what type of job?

A. I was working for myself. I tried to place some two by twelves in place.

Q. That is at your own residence?

A. Yes, sir; and I couldn't make it at that time. My—well, I have an internal quivering which has never left me and physical strain causes it to break out into practically a shaking palsy; and at that time, I practically broke down and I stayed in bed about three days after that, and I developed hemorrhoid at that time just from the strain of lifting. While I was in the hospital, for the eight days I was there, I believe I had two bowel movements, and I hemorrhaged a quantity of blood in the first bowel movement; and in the first three or four or five months I was in the hospital, I went to Dr. Fisher, and he recommended that I go to a Dr. Libby. I went to Dr. Libby, and he told me there was nothing to be worried about, it was just possibly a couple

(Testimony of Harold E. Wibye.)

of cracks in my colon which was causing the trouble and that it would eventually disappear. Well, since that time, and over a period of two and a half years, I have been having a compaction of it in the colon and I have been forced to take enemas on an average of two to three times a week.

Q. Did that condition exist before the happening of the accident?

A. No, after the accident.

Q. Did that condition exist before the happening of the accident at all? A. No, sir.

Q. Generally speaking, what was your condition of health, Mr. Wibye, before this accident happened? A. It was very good.

Q. And you had been regularly employed?

A. Yes, sir.

Q. And had not had any—but I don't want to lead the witness——

Had you had layoffs on account of illness or sickness in the last ten years?

A. No, sir. I believe I took two months off to go deer hunting in '45; and I had two months and about possibly two weeks between jobs—that is, two months after the accident—I was off in '46 and possibly two weeks between jobs. My net earnings—my gross earnings for '46 was approximately \$3600—well, with the ten weeks off for [30] hospitalization, it was three to two weeks between jobs.

Q. Mr. Wibye, had you ever been injured physically in an accident before? A. No.

(Testimony of Harold E. Wibye.)

Q. Or made any claim against anyone for damages arising out of an accident involving physical injury? A. No, sir.

Mr. Richard: You may cross-examine.

Cross-Examination

By Mr. Deasy:

Q. Mr. Wibye, referring to this itemization of medical expenses that you have seen here—counsel gave me a copy of it—— A. Yes, sir.

Q. (Continuing): There appear dates in here without the years, for Dr. Fisher, for \$100, Providence. I assume that is for 1946, starting with twelve, thirty, is that right, the top items, Mr.——

Mr. Richard: We had better give him the sheet.

Q. (By Mr. Deasy): Those first six items appearing, are for 1946, is that right?

A. Yes, sir.

Q. And the remainder, down to the one which appears "Ambulance service, moving,"—now that is also 1946, I assume?

A. Yes, sir; that would be correct. [31]

Q. Now, there appears two items for transfusions. Those were blood transfusions you received in Providence Hospital, are they?

A. No; I believe those are for blood transfusions I paid for for my brother while he was laid up.

Q. (By Mr. Richard): That you paid for, for him? A. Yes, sir.

Mr. Richard: Then they are on the wrong list.

(Testimony of Harold E. Wibye.)

Q. (By Mr. Deasy): I just wondered seeing those there, because you hadn't testified to having received any blood transfusions.

A. Yes, sir. Well, if I had, I wouldn't have known it, I don't believe, because I didn't come to for a day or two.

Q. Now, the item "Nursing and care, \$300," is that the practical nurse which you spoke of in your testimony that went with you?

A. Yes, sir; he was on twenty-four-hour service.

Q. And he was with you for, I think you said—what was it, five weeks? A. Five weeks.

Q. Yes; and that was the total amount of his bill for those services, is that right?

A. Yes, sir.

Q. And the next item, "American Motel, \$175." That is for the period of, you said, ten or fifteen days you were in the [32] motel; is that right?

A. That—yes; but that covers the rental over a period of five weeks. I believe I was there ten or fifteen days, incurring a bill of about \$80 which I paid; and then that also includes a bill from the St. Mark Hotel.

Q. The St. Mark Hotel?

A. The St. Mark Hotel of Oakland.

Q. Is that where you went after you were in the motel? A. Yes, sir.

Q. I understood you to say Providence Hotel. I guess.

A. That's the Providence Hospital.

(Testimony of Harold E. Wibye.)

Q. That should be St. Mark Hotel?

A. St. Mark Hotel is correct.

Q. Now, I notice a bill from Dr. Norcross. What did Dr. Norcross treat you for?

A. Dr. Norcross is a brain specialist. He examined me in the hospital. What he did there, I don't know at the time I saw him.

Q. Was he called in by Dr. Fisher?

A. He was called in by Dr. Fisher as a consultant; but I did go to his office on two different occasions on which he prescribed—I believe he prescribed phenobarbital and sedatives of some type. I went to Dr. Norcross because my vision was fluctuating, and at that time I was seeing nothing but heat waves arising and black spots; and I was having [33] severe pains between my shoulder blades, and shooting pains in my back; and he examined me and prescribed two, or four prescriptions, I believe.

Q. Then, there appears an item for Dr. Weisenfeld, Nose and Throat, during March of 1947. Were you having trouble? What was that for?

A. At that time, I was having severe headaches and I told Dr. Fisher I wanted to go to an eye specialist, and he recommended Dr. Weisenfeld; and I believe Dr. Weisenfeld took X-rays of my head to determine the cause of the headaches, and found the X-rays negative. He gave me a prescription of sleeping pills and, I believe, sedatives. I don't know what it was. It was a prescription.

(Testimony of Harold E. Wibye.)

Q. Then I notice——

A. I beg your pardon. He also pulled the sutures out of my knees. I believe that one time Dr. Fisher was out of town. As I testified, I had three infected spots on my knees which looked like boils, and Dr. Fisher was out of town, and I went to Dr. Weisenfeld and I believe he lanced me with a scapula and removed the pus.

Q. Did Dr. Bartscher—did you go to him for something that occurred as a result of the accident?

A. Yes, sir. Dr. Bartscher is a dentist and I went to him to have a molar—half a molar was broken off during the impact of the wreck and he squared the tooth up and put [34] a gold crown on it. I think the sum was \$10.

Q. The tooth was broken at the time of the impact?

A. Yes, sir; and then two teeth—well, I think I had one or two loose fillings from the wreck. They took the fillings out and killed the nerves and treated—I don't know what the process was.

Q. Then there is another item here in July of 1947, Dr. High, dental work. What was that for?

A. That was for the removal of the loose fillings.

Q. Did the doctor tell you that these fillings were loosened as a result of the accident?

A. I didn't tell the doctor anything about it. The fillings were loosened and I had them replaced.

Q. And these items for Drs. Nutting and Gump that appear here; that was for examination of your eyes, for glasses?

(Testimony of Harold E. Wibye.)

A. Yes, sir; for fluctuating vision; yes, sir.

Q. And they prescribed glasses for you, is that right?

A. Yes, sir.

Q. And there is another item for Dr. High which appears without a date here, in the amount of \$20.

A. That was for examination.

Q. Do you recall when that was?

A. Sometime the first part of this year.

Q. That was in 1949, approximately?

A. Yes, sir. [35]

Q. Did you testify concerning Dr. Libby's treatment?

A. Yes, sir. I went to Dr. Libby when I was having trouble with my rectum and he examined my rectum, prescribed phenobarbital and nerve pills.

Q. And then there is an item "Dr. Hatcheck."

A. Dr. Hatcheck, X-ray.

Q. That is X-rays?

A. Possibly for Dr. Fisher.

Q. The second item for Dr. Hatcheck, I assume, is X-rays taken recently?

A. I don't know. Not recently; at a later date, possibly.

Q. You see there is one at the top of the list here taken in March of 1947 for \$12.50; and this one is without a date here.

A. I had trouble over a period of two years there, and I returned to the doctor several times and he took X-rays on several occasions.

Q. And had Dr. Schock billed you?

(Testimony of Harold E. Wibye.)

A. I believe the doctor put in forty stitches in my knees; and also I stopped to see him once or twice when Dr. Fisher was out of town. He gave me a prescription of phenobarbital and a couple of hypos.

Q. This item for Dr. Burrell, physiotherapy. That was in connection with the trouble in your neck; is that right?

A. Yes, sir. That is heat and massage. [36]

Q. Yes; and the additional item for Dr. Weisenfeld for \$5.00. Now, there is a bill here for Dr. Fisher for a report. Now can you tell us what that is, Mr. Wibye, the second to the last item?

A. I don't know. That must be an error.

Q. Now, you say that, to date, since the accident, you have been unable to resume your occupation, is that right?

A. That is correct.

Q. And have the doctors told you whether or not you will be able to resume your occupation, or when you could be expected to go back to your regular line of work?

A. No, sir; I haven't discussed it with any of the doctors. I haven't taken it up with any doctors. My only purpose in visiting the doctor was to secure relief.

Q. You mentioned, I think, in your testimony, that since the accident, you had a sort of internal quivvering that would break out from time to time. Is that a sort of a nervousness, a nervous condition?

(Testimony of Harold E. Wibye.)

A. Well, on October 10 of '49, I went over to the doctor. I tried to get in to see Dr. Naffziger who is attached to the University of California. I had heard he was a very good back specialist, and I got sidetracked to Dr. Jones and had an examination, and he told me that that possibly was due to shock and nervousness—being of light complexion, that you are very—I was a very nervous type and it wouldn't take [37] much to aggravate it and that possibly it was directly due to shock, is what he told me. He also told me that I was suffering from a cervical strain, and he, too, recommended that I go to the hospital and have traction for the existing condition.

Q. How many times did you go to see Dr. Jones?

A. I believe I was in Dr. Jones' office twice; once for the examination and once after the examination.

Q. Did you succeed on either occasion in seeing Dr. Naffziger? A. No, sir.

Q. Is he associated with Dr. Jones?

A. Yes, sir.

Q. And they sent you a bill for their services in the sum of \$75; is that right? A. Yes, sir.

Q. Now, you say that at the time of the accident, you observed this car approaching in the opposite direction and you estimate he was coming at about the same speed that you were traveling?

A. Yes, sir.

(Testimony of Harold E. Wibye.)

Q. Is that a normal speed for traffic in that section of the highway?

A. Yes, sir. In fact, I believe the uphill traffic travels much faster than downhill traffic, because they are all trying to make the grade going uphill.

Q. And at the point where this accident happened, is there a hill there? [38]

A. A gradual incline down. Off the road or on the road?

A. No, I mean lengthwise of the road.

A. Yes, sir; I would say about a ten-degree—seven to ten-degree.

Q. Were you traveling upgrade or downgrade at the time? A. Slightly down grade.

Q. You were traveling downgrade?

A. Yes, sir.

Q. And then the other car was coming upgrade, is that right? A. Yes, sir.

Q. And is there a curve in the road at the point where the accident happened?

A. Yes, sir. There are two curves. I had just completed a left-hand turn and entered a straight-a-way, and I imagine the straight-a-way was about 200 to 250 feet, and it goes to a right-hand turn.

Q. That is for you, is that right?

A. Yes, sir.

Q. Yes. The other car, then, would simply have been just completing a left-hand turn; is that right?

A. A slight turn; yes, sir—a curve.

Q. And you saw this car coming, then were you able to observe what kind of a car it was?

(Testimony of Harold E. Wibye.)

A. No, it was an olive-drab car.

Q. There was nothing particular conspicuous about it, but it [39] was an automobile coming along towards you, is that right?

A. That is all; yes.

Q. And you say that when he was some thirty-five or forty feet away that the car gradually crept over into the center lane of the highway?

A. No, I said that the cars crossed about—we crossed about thirty-five or forty feet, and in that distance he cut possibly two feet across the white line and then made a sharp left—sharp left-hand turn into the extreme right-hand side lane going east.

Q. And his car went right across in front of your car, didn't it, so that your car ran into the left side of the other car at the front?

A. No, his right side facing the front was the first point of impact with my right side, just inside of the front wheel.

Q. I mean he didn't run into the side of your car; he ran in front of it, isn't that right?

A. Yes, sir.

Q. And you were rendered unconscious by reason of your head striking the——

A. Windshield.

Q. (Continuing): ——windshield of the car?

A. Yes, sir.

Q. And at the same time, you say that your chest was thrown against the steering wheel breaking the wheel off? [40]

(Testimony of Harold E. Wibye.)

A. That is correct.

Q. And bending the column up towards the steering gear? A. Yes, sir.

Q. And your knees obviously?

A. Into the dash.

Q. Struck into the dashboard?

A. Yes, sir.

Q. Do you have a distinct recollection of applying the brakes on your car, or has your testimony in that regard been affected by your having seen pictures of the scene of the accident showing skid marks on the road?

A. At the time of the accident, I didn't have much recollection of anything until after three or four days till my mind started to clear up, and I absolutely—if I have a recollection of applying the brakes——

Q. Do you recall a police officer or highway patrol officer questioning you regarding the accident some time after, some few days, I think, after it happened?

A. No, sir. It seems to me that there was a highway officer in my room at the hospital, but I don't have any recollection of it.

Q. You were still in a dazed condition at the time you talked to him?

A. I believe they were still giving me pills and hypos and sedatives—well, they were slugging me generally with drugs, [41] I think.

Q. Now, you referred in your testimony several

(Testimony of Harold E. Wibye.)

times to having pains in the area at the base of the brain. A. That is correct.

Q. Has the doctor told you that they were at the base of the brain, or are you just using that in some descriptive sense?

A. The doctor hasn't told me anything at all. That is a descriptive feeling I get of it. I had the swelling back here, and the throbbing is across this line here (indicating)—and, well, it's my——

The Court: The pain is in your neck? You have described the place in your neck as being about the point where you think the base of the brain is. Is that it?

A. Yes; from the base of the brain to this large vertebra.

Q. (By Mr. Deasy): What you actually are referring to is the base of the skull?

A. That is correct.

Q. Back where your neck and head joins together? A. That is correct; yes, sir.

Q. Yes.

Mr. Deasy; I have no further questions.

Redirect Examination

By Mr. Richard:

Q. Mr. Wibye, now these two transfusions that were set forth on that bill are bills that you paid for your brother Niels? [42] A. Yes, sir.

Q. In other words, that you advanced for him?

A. Yes.

(Testimony of Harold E. Wibye.)

Q. Now you have the items on there that Mr. Deasy called your attention to, Dr. High, and which you say there were loose fillings which were replaced? A. Yes, sir.

Q. Do you know whether or not those fillings were knocked loose in this accident?

A. I am positive of it, because I could stick my tongue in and feel the movement.

The Court: What he means—what the attorney means is, before the accident, were they loose?

A. I have no recollection of it; no.

Q. You first noticed them loose after the accident?

A. I first noticed them loose after the accident.

Mr. Richard: Immediately after the accident. Allright, I have no further questions.

The Court: We will take a brief recess.

(A brief recess was taken.)

Mr. Richard: Mr. Nelson, will you come forward, please? [43]

NELS K. WIBYE

Called by the plaintiff, sworn.

The Clerk: Please take the witness chair.

Q. Will you state your name to the Court?

A. My name is (spelling) N-e-l-s K. Wibye.

(Testimony of Nels K. Wibye.)

Direct Examination

By Mr. Richard:

Q. Are you one of the plaintiffs in this action in one of the cases? A. Yes, sir.

Q. Where do you live, sir?

A. My home at the present is at 264 East 4th Street, Winona, Minnesota. I am living with my parents.

Q. Are you married or single?

A. No, I am single.

Q. And your age, please?

A. I am 44 years of age.

Q. Now, you were riding in the automobile driven by your brother that we are discussing here today? A. Yes, sir.

Q. And he testified that that automobile belonged to you? A. It did, sir.

Q. Is that correct? A. Yes, sir.

Q. You were riding in the front seat with him at the time of the happening of this accident? [44]

A. Yes, sir; I was riding in the right-hand portion of the seat.

Q. Was there any reason why your brother Harold was operating your automobile rather than yourself at the time of this accident?

A. No reason whatsoever. If we are making a trip, we will alternate; first he may drive first and we alternate every seventy-five to a hundred miles.

Q. And he had started out in the driver's seat that afternoon?

(Testimony of Nels K. Wibye.)

A. Yes, sir; he had started in the driver's seat.

Q. All right. Did you and he get into the car from this same location in the vicinity of 151st Avenue in San Leandro?

A. I believe the work that we were on was at Plaza Drive which corresponds or is the next immediate street to 157.

Q. But were you working upon the same construction job? A. Yes, sir.

Q. And you were driving upon the highway that he mentioned, generally in an easterly direction, and your destination was Bakersfield?

A. That's right; yes, sir.

Q. Do you remember what, if anything, you were doing, since you weren't driving, shortly before the happening of the accident? A. Yes, sir; I do.

Q. And what? [45]

A. I have a habit of collecting news items out of the paper, current events and articles of interest, and I just tear them out and put them in my pocket and read them in my leisure time, and when we start out from the job site, I pull those clippings from my pocket and proceed to read the articles that I am interested in.

Q. Were you engaged in that at the time this accident happened?

A. Well, sir, I do not know; but I presume that I was.

Q. Do you have any recollection of the happening of the accident?

(Testimony of Nels K. Wibye.)

A. I have no recollection whatsoever of the accident.

Q. You do not, then, recollect having seen this olive-drab car approaching you? A. No, sir.

Q. And your first recollection of events after the happening of the accident—you were located where?

A. We were in a stationary position on the roadway.

Q. I see.

A. We were motionless in the car on the roadway, and I have a recollection of someone at the car door. That is the only recollection that I have of the accident.

The Court: You mean after the accident?

A. That is—yes, immediately after I came out of a period of unconsciousness. [46]

Q. However, you were still at the scene of the accident? A. Yes, sir.

Q. Now, did your recollection then continue, or did you lapse off into unconsciousness again? What I want to find out is whether or not your recollection from that time on was good or bad or whether it was just a fleeting recollection.

A. No, sir; it's impossible for me to give you a continuity of events. I can say this: That I have an awareness of someone being at the car door, and I believe that they tried to remove me from the car, and that was all that I remember at that time until we were traveling in the ambulance, supposedly, to the hospital. Of course, I didn't have any realiza-

(Testimony of Nels K. Wibye.)

tion, but I knew that I was in an ambulance because that siren was wailing and I was aware of that.

Q. All right. Now, you eventually landed in Providence Hospital, the same hospital as your brother?

A. That was the final destination, Providence Hospital; yes, sir.

Q. But in the meantime, you were taken to an emergency hospital, the Fairmont Hospital, were you not, of the County Hospitals in Alameda County, I believe? A. That is correct.

Q. Now, do you have a recollection of being in that first hospital at all?

A. Yes, sir; I do have a recollection of being in the first [47] hospital, although I did not know where I was.

Q. Do you have any recollection of anything that was done for you at that first hospital?

A. Yes, sir. I have a vague sense of the fact that I was administered blood plasma. I do not know if they did anything further to aid me.

Q. Now, do you recall the trip from that hospital, Fairmont Hospital into Providence Hospital in Oakland, in an ambulance?

A. Yes, sir; I do remember riding in the ambulance. I do not know if I remember the entire progress of the trip or not, but I know that I was aware of being in an ambulance.

Q. Would you tell me, Mr. Wibye, when, if you can, with respect to the 8th day of November, the

(Testimony of Nels K. Wibye.)

date of the accident, there came a time when you had a pretty clear recollection of events from then on?

A. After the accident on the 8th day of November, I have no clear recollection of events whatsoever.

The Court: No, he means what is the first time that you really came to yourself and from there on were you able to recall.

The Witness: Well, sir, that was in Providence Hospital, I presume, that my really first conscious memory is; at that time that I was coming out of the anesthetic after the first day surgery.

Q. (By Mr. Richard): Do you know whether that was on the [48] night of the accident, upon the day following, or two days following?

A. Well, I do not know, because I have no recollection of the passage of time.

Q. All right. So that you have no recollection of having gone into surgery for the first time at all?

A. I have no recollection of being in surgery whatsoever for the first time that we were there.

Q. You do not, of your own knowledge, know what was done? A. No, sir; I do not.

Q. When you finally came to—after you say you came out of the anesthetic in the Providence Hospital——

A. The Providence Hospital.

Q. (Continuing): ——were you in bed?

A. I was in bed; yes, sir.

Q. And did you have any appliances, casts, or

(Testimony of Nels K. Wibye.)

bandages, or anything like that? A. Yes, sir.

Q. To any parts of your body?

A. I did, sir.

Q. What sir?

A. Well, my first recollection is that I was in bed and my both arms were suspended in the air, my right arm, probably from here over the wrist.

Q. Now, you are indicating about midway between the wrist and [49] the elbow?

A. Yes, perhaps midway or three-quarters of the way of the distance to the elbow; from that portion down to my knuckles. My arm was in a plaster cast and hanging up in the air in this position. (Indicating.)

Q. What about your left arm?

A. My left arm was bandaged, I believe, in what they call a semi-rigid bandage which bears a similarity to a cast; and it also was suspended in the air. My right knee was——

Q. Now you are indicating your left knee there.

A. Excuse me. My left knee was off the bed in this position here (indicating). It was suspended in a sling, and this—the rope on this sling went through a pulley and down to weights, which were combined with weights attached to my foot. In other words, my left leg was in traction. My left leg was badaged from my knee down around my foot. I do not know the technical name of the type of bandage they apply in that particular case.

My right leg was in a plaster cast from my hip down to my foot. It was also in traction. I did not

(Testimony of Nels K. Wibye.)

know at the time, but I learned later that they had inserted a wire rod through my heel in order to attach the weights, that I might lie in traction.

Then I had—I couldn't—I guess perhaps that I tried to speak. That's the probable normal thing to do, and I discovered [50] that I couldn't speak in any manner that was really understandable, I don't suppose; and I discovered that one of my front teeth was missing. Then, too, my teeth on my upper jaw were loose and I could move them around with my tongue; and I also recall bleeding from the mouth and also from various cuts that I had about my face; and I think I had some cuts on my head that were really not severe enough or bad enough to require suturing; and perhaps when I moved my head, why, I knocked off scabs or something—I don't know—and my stomach was distended and it looked like probably half a bushel basket under the sheet, and I was in *every* severe pain. I was in agonizing pain from my head to my feet. There was no outstanding pain; I couldn't localize my pain. And at that time, of course, I didn't have—I couldn't rationalize anyway—so it didn't make much difference to me—even the thought of it.

Q. Now, I understand, at that time, that you had been in surgery?

A. Yes, sir; that's after I returned from—well, we might say the first aid surgery. That is, when we were brought to the hospital, we were taken to the Fairmont and transferred from the Fairmont to Providence. After we arrived there, we were

(Testimony of Nels K. Wibye.)

taken into surgery for preliminary check-up and treatment.

Q. Now, in your own words, will you just detail to his Honor and count the injuries that you received in this accident—in [51] your own words as best you know, and the complaints that you had?

A. Well, sir, starting with my head, as I say, the first awareness in relation to it is the fact that my upper teeth were all loose and one was missing in the front. This being the case, it wasn't possible for me to bite or chew food, and my food was given to me in small pieces I could just probably take with my molars and chew a little bit and then swallow; but I was unable, as I say—as I say, I was suspended and I was unable to take care of feeding myself or taking water or anything. Well, it was impossible to do anything with regard to the teeth at that time. In fact, I wasn't even thinking about that; and I did know—I knew that I had cuts on my face. I knew my face was swollen; I knew that I had cuts there. And then I soon learned that I had a cut across my chin which shows approximately two inches at this time, which was sutured by the doctors in surgery the first time that they worked on us.

When I came to or came to consciousness in the hospital, the only movement that I was capable of turning was the turning of my head to the right and to the left—and I have to stop a minute and think where I am going.

(Testimony of Nels K. Wibye.)

I have mentioned the cut here (indicating). I have mentioned my teeth.

Q. Did you have cuts above the right arm? [52]

A. Yes; but I haven't quite completed with my head as yet, sir.

Q. All right.

A. I was in pain, as I say, from head to foot.

The Court: You already said you had some cuts in your head and a cut on your forehead and a cut on your chin.

The Witness: That is correct. Since that time, I have a mild sensation of a mild electrical shock, or it's undulating, a fluttering feeling on the right side of my head which occurs once or twice a day.

Q. (By Mr. Richard): Now you indicated the left side of the head.

A. Yes, on the left side of the head. It's on the left side of my head; and I have a sound in my ear, the sound of air escaping through the valve of an automobile tire. That takes care of my head; and I have a free motion of my head.

My eyesight, my situation is normal, although I might say this: For a period of several weeks, I was unable to read newspapers; the print was just merely a blur. Dr. Norcross was called in to check me on that and he said it was concussion and shock and I would come out of that.

I have on my right arm—it was lacerated from here down to this point and from this point across to here. (Indicating.) This portion is the one which

(Testimony of Nels K. Wibye.)

was under the cast and was sutured, and I was later told that Dr. Fisher had had to tie the cords into these three fingers. I think about—oh, it [53] was several weeks later when the cast was removed, my hand and my wrist was rigid, so the doctor started me on physiotherapy. I started to bend the fingers—with adhesions in here that would not allow my wrist to bend. I do not have the full motion of my wrist now; and gradually, through constant exercise, I have brought my right hand so that I have full motion of my fingers.

The Court: You have a limited motion?

A. Yes, in the wrist; but it's not a fluid motion; it's a conscious——

Q. (By Mr. Richard): What about your grip, Mr. Wibye?

A. My grip has developed so that I have a fair grip in my right hand.

Q. Now, the scar on the right form is is approximately six or eight inches?

A. No, I would say it's over five inches. There is five inches that is in evidence there.

The Court: Has the fracture in your hand healed?

A. Well, I don't know, sir.

Q. I mean was there a fracture in your hand above the wrist?

A. No, sir; I think it was caused because the cords were tied in here.

Mr. Richard: I believe there was no fracture involved in the right wrist.

(Testimony of Nels K. Wibye.)

Q. Now your left arm? [54]

A. May I complete with my left hand, sir?

Q. Yes; go ahead.

A. I have in this area through here (indicating) —I do not have a normal feeling in the hand. It's not a healthy, normal feeling. It's sort of a numbness, but at the same time, it's very sensitive and if I happen to touch something like this, unconsciously I have a violent reflex action here, and this arm in this area here will become numb and go to sleep probably once a day or twice a day and may skip a day or two. That completes my right arm.

Q. Now your left arm?

A. Now my left arm, starting from my thumb. I have here a scar approximately an inch and a half which was sutured, and I believe the cords were tied in here; and this hand was also rigid and had very little motion in my thumb and fore finger; and that too was brought out to start out by physiotherapy. I would just have—perhaps I can show you—(witness removes coat)—I have here a scar that was sutured, which is approximately an inch and a half long, perhaps a little more. I do not know if there is any particular damage in there or not.

I have, across the back of my arm, this area here, approximately four and a half inches long. Then, I have a scar under here. It's jaggered.

The Court: In your arm pit? [55]

Mr. Richard: Left arm pit.

The Witness: In the left arm pit; yes, sir. This, of course, is severely painful to start with.

(Testimony of Nels K. Wibye.)

The Court: Any fractures in that arm?

A. No, sir; no fractures.

Q. This is a somewhat same type of injury as the left arm, as far as the cords and nerves are concerned?

A. I believe, sir—I was told that these cords here are tied; and I think there is some tying in here and in here; but that is what I have been told.

Q. Have you got a grip on that right hand?

A. I have a fair grip and full motion of my fingers.

Q. Any wrist motion?

A. Excuse me. I have fluid motion of my left wrist.

Mr. Richard: All right. Will you put your shirt on?

A. Yes, sir.

The Court: How much do you weigh now?

A. I weigh between 185 and 190 which is my normal weight.

Q. I suppose you lost weight after the accident, and then regained it?

A. Yes, sir. I presume that when I entered the hospital, I weighed—oh, between 185 and 190 pounds; and when I got so that I could move about on my crutches; I went down to the scale room and weighed myself, in probably the middle of February or the latter part of February, and I weighed 130 pounds. [56]

Q. Now you weigh about 185?

(Testimony of Nels K. Wibye.)

A. I weigh between 185 and 190; yes, sir.

Q. (By Mr. Richard): Now, Mr. Wibye, let's go down to your lower extremities.

A. Well——

Q. Get your shirt buttoned.

A. Excuse me.

The Court: That's all right. He can do that after recess.

The Witness: The first surgery that was performed on me after we were duly admitted and thoroughly examined and taken care of in the hospital was on my left buttocks. I did not know what was wrong or what the doctor was going to do. I knew there was something wrong that had to be repaired; and I have an incision across my left—across the left buttocks here in this manner, something like that it's sutured for—oh, probably eight inches or more; and on this surgery, Dr. Fisher inserted two screws to replace the socket on the femur. The socket of the femur was broken off and the two screws were placed there to bring it back.

The Court: There was a fracture there?

Mr. Richard: There was a fracture of the left acetabulum.

The Witness: And then after the first surgery, I had transfusion. After I had built up a little bit, they operated on my right knee, and I have an incision there that [57] is several inches long; and there was a fracture in here that went into the knee joint and the doctor put in three or four screws in there to weld the bone back together.

(Testimony of Nels K. Wibye.)

The Court: Have you motion of the knee now?

A. I have restricted motion of the knee. I can not—for instance, I can bring my left up in this manner; and that's the limit of my right. (Indicating.)

Q. Yes.

Q. (By Mr. Richard): Now was that surgery performed at the same time as on the left hip, or was that later?

A. The surgery was performed——

The Court: He is referring to his right leg there.

The Witness: The surgery on my right leg was performed two weeks, perhaps more or less, after the surgery on my left buttocks.

Q. (By Mr. Richard): All right. Now, there was also surgery performed on the right hip, was there not?

A. At that time, there was no surgery performed on my right hip. I laid in traction for a period of approximately eleven or twelve weeks. I knew that there was something wrong in here, but due to my condition, it was impossible to do anything for me.

Q. And then after some eleven or twelve weeks, was surgery performed on the right hip?

A. No, sir; there was no surgery performed on my right hip [58] until the 11th day of June in 1947.

Q. And then what was done, generally?

A. On the 11th day of June, I entered surgery,

(Testimony of Nels K. Wibye.)

and Dr. Fisher rebroke my hip and inserted a pin into the bone, a pin and plate affair that is screwed onto the bone, adjoining my legs together again.

Q. There had been a fracture in the right hip originally? A. Yes, sir.

Q. And then it was broken and an open reduction was made with surgery? A. Yes, sir.

Q. Was general anesthetics administered on these operations that you have told us about?

A. I believe that I had a spinal on the two operations, that is, on my right knee, my right hip; and on my left hip, I had ether, I believe.

Q. Now, you entered the hospital on the 8th of November, 1946. How long did you remain there continuously until you left the hospital the first time?

A. I left the hospital on the 4th day of March in 1947.

Q. And during that period of time, you were constantly in the Providence Hospital?

A. I was constantly in Providence Hospital.

Q. And you were attended generally by Dr. Fisher? A. Dr. Fisher was my—— [59]

The Court: Is Dr. Fisher going to be a witness?

Mr. Richard: Yes, your Honor.

Q. Were other doctors called in consultation? You have mentioned Dr. Norcross.

A. Well, Dr. Norcross was called in, and Dr. Libby, I believe, was.

(Testimony of Nels K. Wibye.)

The Court: I think you might make it easier if you leave that to the doctor to testify to.

Mr. Richard: All right. You mean the specific things?

The Court: Yes.

Mr. Richard: All right.

The Court: After all, those are not controversial matters as to whether another doctor was called in, and it's better to have the doctor testify. We would get a little more accurate information that way.

Q. (By Mr. Richard): All right. Then, when you left the hospital, where did you go?

A. I went to the Harrison Hotel.

Q. Were you readmitted to the hospital again?

A. I was readmitted to the hospital on the 10th day of June, 1947.

Q. How long did you remain at that time, approximately? A. I remained ten days.

Q. And during that time, the operation was performed, as I understand it, on the right hip? [60]

A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. Now what was your condition between leaving the hospital in March and your re-entry in June, as far as being ambulatory?

A. Well, sir, when I left the hospital in March, I left as soon as I could possibly get out of there. I was able to move about on crutches for a distance of approximately one hundred yards, with great difficulty. I had no—my right—after the cast was removed, my ankle was rigid and my knee was

(Testimony of Nels K. Wibye.)

rigid and my hip was stiff, and so it was very difficult to get about. I walked around with crutches in that manner, (indicating)—on two crutches for a period of time, and gradually I came to a point where I could get around with a crutch and a cane; and just prior to the time I entered the hospital, I got so that I could get about for a distance of fifty or sixty yards on a cane alone, but it was impossible for me to walk anywhere in a normal fashion, because of the fact that my hip wouldn't function; and my leg was apparently a great deal shorter than my left.

Q. Now, as I understand it, when you entered the hospital for the second time, you had no casts upon the leg?

A. I had no cast upon me; no, sir.

Q. Now, you were in the hospital approximately ten days the second time? [61]

A. Yes, sir.

Q. And did Dr. Fisher perform the surgery?

A. Dr. Fisher performed the surgery.

Q. At that time?

A. Yes, sir.

Q. When you left the hospital after being in there in June, was the right leg in a cast?

A. The right leg was not casted.

Q. So that when you left the hospital the second time, you were without casts?

A. I was without casts.

Q. How did you get about after leaving the second time?

A. Well, sir, I got about after leaving the second

(Testimony of Nels K. Wibye.)

time much in the same manner as leaving the first time. I required the support of two crutches to move about, and I had to go through the same process of relearning to walk as I did in the first instance.

Q. Now, have you detailed, generally speaking, the injuries that you received in this accident, Mr. Wibye?

A. Yes, sir; I did.

Q. In your own language——

A. Yes, sir; I have covered everything insofar as I am aware.

Q. Now, you incurred certain obligations.

The Court: Have you got a list of those like you had in [62] the other case?

Mr. Richard: Yes; I am looking for it right now. Unfortunately, your Honor, I didn't have this typed up. Might I read these items?

The Court: All right.

Q. (By Mr. Richard): I will ask you if these items were furnished by you to me (reading): "Dr. Fisher—Dr. Lloyd Fisher, for services, \$1146.25"?

A. Yes, sir.

Q. "Providence Hospital, \$1716.59."

A. Yes, sir.

Q. "Special nurses, \$900"?

A. Yes, sir.

Q. And the special nurses were all of Providence Hospital, were they not?

A. Yes, sir.

Q. "X-rays, \$235."

A. Yes, sir.

Q. "Dr. Libby, \$50"?

A. Yes, sir.

(Testimony of Nels K. Wibye.)

Q. "Dr. Norcross, \$20"? A. Yes, sir.

Q. "Dr. Kracaw, \$25.00"? A. Yes, sir.

Q. "Ambulance hire, \$3.75"? [63]

Q. "Crutches, \$5.15"? A. Yes, sir.

Q. "Cane, \$3.00"? A. Yes, sir.

Q. "Vibrator, \$23.64"? A. Yes, sir.

Q. Was that prescribed by the doctor?

A. It was not prescribed by the doctor, but I knew that massage and exercise was in order to facilitate that work and I procured the vibrator.

Q. And you have a pharmacy bill here of \$6.19.

A. Yes, sir.

Q. And if my addition is correct, those totals are \$4,134.56.

Mr. Richard: We offer that list in evidence, if your Honor please; and I might state that, except for a very few incidental items, those are supported by cancelled checks which we have right here.

The Clerk: Exhibit two.

(List of medical expenses, Nels Wibye, was then admitted in evidence and marked Plaintiff's Exhibit No. 2.)

The Court: Well, perhaps we might take a noon recess now and we will reconvene at 2:00 o'clock.

Mr. Richard: I am sorry I didn't notice it was 12:00.

(Court was then adjourned, to reconvene at 2:00 o'clock, p.m.) [64]

(Testimony of Nels K. Wibye.)

Afternoon Session—July 28, 1950

(Nels K. Wibye, being previously duly sworn, resumed the witness stand and testified as follows:)

Further Direct Examination

By Mr. Richard:

Q. Mr. Wibye, in connection with the expenses incurred by you shown on the sheet that was introduced in evidence, there is not included an item of transfusions of \$50 which apparently was on your brother's sheet.

A. Well, sir, I believe that you will find in the bills that I have received from the hospital, that I have paid to the hospital a processing charge in connection with these transfusions for the processing of blood. That's the only——

Q. But you did not pay for the blood that was actually used?

A. No, sir; I did not actually pay for the blood; I merely paid for the processing, for the laboratory work.

Q. And this \$50 represents a charge for the blood plasma?

A. Yes, sir. I did not pay any——

Q. But your brother did? A. Yes.

Q. All right. Now what was your business or occupation at the time of the happening of this accident, sir?

(Testimony of Nels K. Wibye.)

A. Well, at the time of the accident, I was working as carpenter foreman on a small project.

Q. Was that the same project upon which your brother Harold was working?

A. Yes, that is correct.

Q. And you were a carpenter foreman?

A. I was working as a carpenter foreman at that time; yes, sir.

Q. That is what I mean; right then.

A. Yes, sir.

Q. And you had worked the day of the accident, as I understand? A. Yes, sir.

Q. What wage or remuneration were you receiving at that time for your services?

A. I was receiving \$100 a week for a 40-hour a week—on a basis of 40 hours; yes, sir.

Q. That was base pay for a carpenter foreman?

A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. Now for how long prior to this accident had you been engaged in the carpentering or construction business?

A. Well, I have worked at construction off and on during my entire life when I haven't been going to school; but I became actively engaged—that is, I put my whole time in on construction work since the year of 1931 or '32. It is [66] in the early thirties that I set out to work at construction as a business.

Q. Let's take for the period of six or eight years

(Testimony of Nels K. Wibye.)

—say eight years before the happening of this accident, which takes us back to somewhere around 1938. Had you been working regularly at your trade as such?

A. Well, we came—my brother and I came to Oakland and we went to this small job. We knew it was just of short duration but we came here primarily in search of work, but as a carry-over, and we took this small job and—

Q. Well now—

A. (Continuing): —and previous to coming up here, I was working for O. D. Williams at Bakersfield. I only worked for Mr. Williams for several weeks. We didn't see eye to eye, so we just parted.

Q. What kind of work were you doing upon that job?

A. I was engaged by Mr. Williams to work as a general superintendent in charge of three telephone buildings that he had under construction; but, as I say, we couldn't get along; we didn't get together.

Q. You worked several weeks upon that project?

A. Yes.

Q. What did you receive there?

A. I don't recall definitely. It was either \$135 or \$150 a week. I haven't a clear recollection of it.

Q. Did you engage in construction work either supervising or as foreman or things of that kind during the war?

A. Well, sir, yes, I will go back; I will travel backwards. Yes, during the war.

(Testimony of Nels K. Wibye.)

Q. That is during the time that the United States was engaged in the war between 1941 and 1945?

A. In 1945, I went to work for the engineers of the Naval Ordnance, Inyokern, California. I was employed by them as a general carpenter foreman; and then I was given the superintendency of the Channel Lake area.

Q. And what was that? What kind of work were you doing?

A. That's a job that I had the direction and the coordination and supervision of the various crafts engaged in the construction of the various buildings they were putting up at that time.

Q. What did you receive there in the way of wages?

A. My weekly wage there was \$135 as Area Superintendent. Toward the middle of the summer, I went to work as a mechanical superintendent for the same company. I went from general foreman to Area Superintendent; and then went into the mechanical, and I had charge of the installation of machinery and equipment of the California Institute of Technology. In this capacity, I had an organization of my own and I was responsible only to the C.I.T.

Q. That is California Institute? [68]

A. Yes, sir. And I had first call on the facilities and manpower of the Hattock Engineers and the various subcontractors.

Q. What did you receive in that work?

(Testimony of Nels K. Wibye.)

A. Well, I received—my pay remained the same, \$135 a week, but if I had went in the office I would have gotten \$150.

The Court: During the five years prior to this accident, how much of that time would you say you were actually employed?

A. Five years prior to the accident?

Q. During the five years.

A. During the five years, I was employed one year there.

Q. No, no, I don't want you to go into detail. I want you just to tell me whether you were employed all the time or seventy-five per cent of the time or fifty per cent of the time, to the best of your judgment.

A. I will say this: I did work in 1941 and '42 practically the entire period.

Q. Were you sick in '43?

A. Yes, I was ill in 1943 and 1944; yes, sir.

Q. What was the trouble?

A. Well, sir, the Austin Engineering Company sent me from Freeport, Texas, to Port Huron, Michigan, to construct some power buildings. When I was there, I came down with chills [69] and fever, and unfortunately, instead of getting an M.D., I got a man——

Q. What did you have, malaria?

A. I don't know. Instead of getting an M.D., I got a man with a D.O. degree and I did not know that he could not get me entrance to a hospital;

(Testimony of Nels K. Wibye.)

and he filled me full of sulfa drug which was a miracle drug at that time, and he knocked me out.

Q. It was from that time of illness that you were laid up? A. Yes, sir.

Q. Now that brings you up—now you say you worked in 1945? A. Yes, sir.

Q. Now during 1945 and in 1946, up to the time of this accident which was in November, that's about 23 months, how much of that time; what percentage of that time were you actually working?

A. I worked 95 per cent of the time in the year 1945 and the year 1946, I earned probably—oh, \$1800 to \$2000. I wasn't unemployed during the year totally during '46, because of the fact that I was job weary when I came off in January and I went home for a period of several weeks, and then I went out and tried to establish or line up a business that I could engage in myself. [70]

The Court: Go ahead.

Q. (By Mr. Richard): Have you done any work since the happening of this accident in November, 1946, Mr. Wibye?

A. I have done no work since that time.

Q. Have you tried to do any work?

A. Well, I have done small jobs, odd jobs around the house. I have done a little electrical repair work and changing of electrical receptacles, and that is wall plugs and wall switches, and helped my father. I attempted to help him at papering.

Q. That is in your own home back in Minnesota?

A. Oh, yes; that's merely work at home.

(Testimony of Nels K. Wibye.)

Q. But you have not worked for hire?

A. No, I have not worked for wages.

Q. Having in mind your activities generally, what were you required to do upon these various jobs? What is it now that prevents you from engaging in your usual occupation?

A. Well, I have limited motion in my leg. In my right leg, the muscular strength has not returned to normal. I haven't developed, or recuperated slowly. The change has been practically, you might say, imperceptible.

Q. Does your right knee, your right leg, pain you upon use?

A. Yes, I have pain below my right knee in this region here (indicating). When I am idle and not doing anything, [71] the pain subsides and I can walk a ways without any sensation of pain; but as fatigue sets in, why, the pain sets in in my knee and likewise sets in in my hip.

Q. You are indicating your right hip.

A. In my right hip, yes; in my right hip, I have a pain that starts to the left of my coccyx and extends in around the hip, in the hip in here, and up into my back in here; and, as I say, as fatigue sets in, the pain starts up and increases in intensity, and I will come to a point where I just can't go any more and I have to go down. If I don't sit down and relax, why, it will pull me down.

The Court: I noticed that when you walked up to the witness chair, you walked rather slowly. Why do you do that?

(Testimony of Nels K. Wibye.)

A. Because I cannot move my right leg normally. I have a discord action on my left leg. So far as I know, it is probably restricted, but maybe it is less than one per cent, probably; but my right leg, I cannot move this, my right knee.

Q. That is because of the stiffness, is it?

A. Well, this—yes, this knee is more or less rigid. It seems as though there is a ridge; this bone is broken up into the knee. There is a ridge in there and it is sort of compacted there that doesn't give me free action on the knee. [72]

Q. (By Mr. Richard): Mr. Wibye, on movement of the knee, you indicated to me yesterday, you can hear a grinding sound.

A. Yes, it cracks when I——(indicating)

The Court: Yes, I can hear it from here slightly.

Q. (By Mr. Richard): Well, having in mind, Mr. Wibye, the work generally that you have been engaged in for the last sixteen or eighteen years, is it necessary for you to climb upon scaffolding and be in and about buildings and on ladders and structures?

A. Yes, sir. I may be in excavation one minute, and five minutes later I may be 100 or 150 feet in the air. It is necessary to climb up and down ladders.

The Court: It isn't necessary to go into that. The Court can take judicial notice of the nature of the occupation of carpenter and construction.

Mr. Richard: Certainly.

(Testimony of Nels K. Wibye.)

Q. Do you feel that you are able to do that work at the present time? A. No, sir, I do not.

Q. Have you been at any time since the happening of this accident? A. I have not.

Mr. Richard: You may cross-examine.

Cross-Examination

By Mr. Deasy:

Q. Now, Mr. Wibye, you have been billed by the hospital [73] and the doctors in connection with these expenditures which are listed on this list; is that right? A. Yes, sir.

Q. And you made this list up, I understand, for Mr. Richard from the bills that you received?

A. From the bills, sir, and the cancelled checks in payment of those bills.

Mr. Richard: Here are the cancelled checks, and I believe each one is separate, doctors and hospitals and special nurses, and everything except for a very few, there are cancelled checks for every item.

Q. (By Mr. Deasy): Dr. Fisher's bill was \$1146.25, is that right?

A. That is to that particular time; yes, sir. I have seen Dr. Fisher since that statement.

Q. You mean that there will be an additional bill from Dr. Fisher for your treatment?

A. Yes, sir; I have gone to see Dr. Fisher periodically, and there is outstanding the bills for some cause.

Mr. Richard: Dr. Fisher's bill in April \$1146.25?

(Testimony of Nels K. Wibye.)

Mr. Deasy: Yes.

Q. And then the hospital bills. How long did you say you were in the hospital? From November until March, is that right?

A. Yes, sir; November until March. [74]

Q. Of 1947?

A. Ten or eleven days; I am not sure which it would be; I think it's either ten or eleven.

Q. And their total bill for treatment to you and for the use of the hospital facilities during that period of time amounted to \$1716.59, is that right?

A. I believe so.

Q. Is there any outstanding bill from the hospital in addition to that?

A. There are no outstanding bills in connection with the hospital whatsoever, nor any other bills excepting Dr. Fisher.

Q. And the total nurses bills were \$900?

A. Yes, sir.

Q. Now, this item you have, \$235 for X-rays. That includes, does it, all the X-rays which were taken at any time during the time you were under treatment by the doctors or in the hospital?

A. That is up to the time that that list was submitted; yes, sir. There were other X-rays since.

Q. Those were taken at the direction of Dr. Fisher when you recently saw him; is that right?

A. They were taken at the direction of Dr. Fisher.

Q. What was Dr. Libby's bill for what treat-

(Testimony of Nels K. Wibye.)

ment? What treatment did he provide you with, Mr. Wibye? [75]

A. I cannot definitely say. Dr. Libby works in conjunction with Dr. Fisher.

Q. What particular items of services was the bill for? Did he treat you during the time that you were first unconscious in the hospital?

A. Excuse me; I believe that Dr. Libby assisted on surgery perhaps with Dr. Fisher.

Q. What was Dr. Norcross' bill for?

A. Dr. Norcross was sent in to examine me by Dr. Fisher, as he is primarily—his profession is brain specialist, and he examined me in connection with this shock, concussion.

Q. There is another doctor here, Dr.—

A. Peacock, sir. He is a house physician, or was at that time, the house physician at Providence Hospital; and I think that perhaps he assisted Dr. Fisher; I cannot rightly say.

Q. And the bill you have for pharmacy, that is for medicines which you purchased after leaving the hospital, is that right?

A. No, sir. That was, if I recall correctly, that is for medication received and purchased at the hospital dispensary during the time I was at the hospital. Yes, I am positive of that fact.

Q. That wasn't included in the hospital bill, is that right?

A. No, sir; the pharmacy bill is a separate item. However, [76] it may be a prescription—part of it

(Testimony of Nels K. Wibye.)

may have been a prescription. It was filled at the pharmacy after the time I left the hospital, at the direction of Dr. Fisher.

Q. Now this vibrator which you purchased was for the purpose of limbering up the stiffness in the muscles?

A. Yes, sir. Excuse me, it is for the purpose of massaging my arm and wrist and hands and thumb, and to induce circulation in my leg and bring back the muscular development.

Q. I think you stated that you only worked a portion of the year during 1946; is that right?

A. That is correct, sir.

Q. What is the reason for that? That you were laid off between jobs, is that what it was?

A. No, sir. I completed my work the first of the year in 1946 and could have remained at work at the base, but it was my desire to go home for a period of time, and it was also my desire to get out and look around and see if I could establish or get into some kind of business where I could earn my own livelihood, rather than working for someone else.

Q. In other words, you finished work at this Naval base, whatever it was down there. What did you say the name of that base was?

A. Naval Ordnance Station 160.

Q. At Inyokern?

A. Inyokern, California.

Q. And when you finished the work there, you took time out [77] to take a little rest and look

(Testimony of Nels K. Wibye.)

around, is that right? A. That is correct.

Q. With the idea of getting into something a little more permanent?

A. That's right—not more permanent, it was——

Q. Well, I mean something that was some civilian work?

A. I wanted something where I didn't have to go to work with the whistle and stop with the whistle.

Mr. Deasy: I have no further questions.

Redirect Examination

By Mr. Richard:

Q. Mr. Wibye, on this list that contains all these cancelled checks, I find this statement that I believe I overlooked: "Dated March 30, 1948," a Dr. Hargett at St. Charles, Minnesota, a dentist, for dental services. A. That is correct.

Q. In the amount of \$262, marked "Full upper denture, full mouth X-ray, extract all upper teeth."

A. That is correct.

Q. Were those services performed there the result of the injuries you received as a result of the accident? This morning, you detailed about some of your teeth, one tooth being out, other teeth being loose. A. Definitely.

Q. And as a result of that, these services were performed? A. Definitely. [78]

Q. And this bill was presented, and I see it is marked paid. A. Yes, sir; I paid it.

(Testimony of Nels K. Wibye.)

Mr. Richard: We offer that in evidence, if your Honor please.

The Clerk: Exhibit 3.

(Invoice for dental work, N. K. Wibye, was then received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Richard: I believe that is all, your Honor.

(Witness excused.)

ERNEST H. SCHOENING

called by the plaintiff; sworn.

Direct Examination

By Mr. Richard:

Q. Your name is Ernest H. Schoening?

A. Schoening (spelling), S-c-h-o-e-n-i-n-g; that's right.

Q. You reside where?

A. Menlo Park, California.

Q. And your business or occupation?

A. Traffic Officer of the California Highway Patrol.

Q. And you have been connected with that department for approximately how many years?

A. Since 1934.

Q. I will ask you, sir, whether or not on the 8th day of November, 1946, you were a member of the Highway Patrol working in the County of Alameda?

(Testimony of Ernest H. Schoening.)

A. I was. [79]

Q. What office were you working out of at that time? A. The Hayward Office.

Q. Do you know whether or not on the afternoon of that date you were called to generally the east side of Pergola Hill on Dublin Highway in response to a claim that there had been an accident?

A. I was.

Q. Do you recall where you were, Officer, when you received the call?

A. Yes, I was approximately about a mile and a half west of Dublin on what we call the Mooma Hill.

Q. And that is approximately how far from the place of the accident?

A. I would say it would be approximately four and a half to five miles.

Q. All right, Officer, upon receiving that call, you proceeded, did you, and found that there had been an accident? A. I did.

Q. Was that in the vicinity of Pergola Hill?

A. It was on the east end of Pergola Hill.

Q. When you arrived, what did you find, sir?

A. On arriving at the destination, I found two cars on the south portion or the south shoulder, approximately a short distance above what we term the Old Dublin Road. The traffic was quite congested, and upon arrival at the automobiles, I found the driver of the one car embedded in the debris, and the other two occupants had been taken by the ambulance to the hospital.

(Testimony of Ernest H. Schoening.)

Q. Now the occupant that you say was embedded in the debris was in which automobile?

A. He was in the government car, the Plymouth sedan, later found out to be John Elliott Hadley.

Q. Officer, you have a couple of photographs there, I believe? A. I have.

Q. I will ask you if in this first photograph you can see a tow car in the vicinity and to the right of the tow car you see two automobiles?

A. I do.

Q. Are those the two automobiles that you found upon arrival at the scene of that accident?

A. They are.

Q. Does that photograph fairly portray the location of those two automobiles when you arrived?

A. They do.

Mr. Richard: There are a number of them. Shall we offer them singly or in a group, Judge?

The Court: Whichever way you wish.

Mr. Richard: Well, here's another one. I am sorry you haven't seen that.

Mr. Deasy: No. [81]

Mr. Richard: We offer that; and in conjunction therewith—now you have seen these?

Mr. Deasy: Yes.

Q. (By Mr. Richard): This apparently is a view closer up of the two automobiles.

A. That's right.

Q. Is that correct? A. That's right.

Q. Does that likewise portray a true situation at

(Testimony of Ernest H. Schoening.)

the time you arrived, as far as the two vehicles are concerned? A. Yes, it does.

Mr. Richard: We offer those, your Honor. We suggest they be marked together, showing the two vehicles together.

The Clerk: Exhibit 4.

(The two photographs referred to were received in evidence and marked Plaintiff's Exhibit No. 4.)

Q. (By Mr. Richard): Do you have the license number that was taken down by you upon the government car?

A. Yes, I have. It is 1942 Plymouth Sedan, USA 142857, and it has the following on there, Capital SEGD dash ADM 12.

Q. I show you here the photograph of an automobile, and upon the hood, the numbers 142857, showing the left side, and ask you if that portrays the left side of the government automobile as it existed immediately after the happening of the accident? [82] A. Yes, it does.

Q. Now, I show you another photograph.

The Court: Do you want that marked?

Mr. Richard: I would suggest that I have another one showing the other side that might go in together.

The Court: All right.

Q. (By Mr. Richard): Another showing 152857, showing the front and right side. Is that the same automobile? A. It is.

(Testimony of Ernest H. Schoening.)

Q. And is that the condition in which it existed upon your arrival? A. It was.

Mr. Richard: If your Honor please, we offer those two, being the government automobile.

The Clerk: Exhibit 5.

(The two photographs referred to were received in evidence and marked Plaintiff's Exhibit No. 5.)

Q. (By Mr. Richard): I show you another photograph in which, I believe, you are shown in the picture. Is that you, Officer?

A. That's right.

Q. And what is that?

A. That is a picture of the government car before the body was removed; Mr. Hadley's body, we removed.

Mr. Richard: We offer that, if your Honor please.

The Clerk: Exhibit 6. [83]

(The photograph referred to was received in evidence and marked Plaintiff's Exhibit No. 6.)

Q. (By Mr. Richard): Now, I show you this photograph and ask you if it represents the other automobile? A. Yes, it does.

Q. And does that fairly show the condition that automobile was in immediately after the happening of the accident? A. It does.

Q. Here is another view which is practically the

(Testimony of Ernest H. Schoening.)

same, except that it shows more of the windshield, is that right? A. That's right.

Q. And shows the area of the windshield there that apparently is broken out, whereas the first one did not. A. It does.

Q. But the second photograph I showed to you is a clear portrayal of the automobile operated by Mr. Wibye. Correct? A. It is.

Mr. Richard: We offer those, if your Honor please.

The Clerk: Exhibit 7.

(The two photographs referred to were received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. (By Mr. Richard): Now, I show you this photograph which shows a roadway, and ask you if that shows the general location, a picture of the roadway taken at or near the place where this accident happened? [84]

A. It is.

Q. And that photograph is looking in which general direction?

A. It would be looking east or toward Dublin.

Q. And that would be looking downgrade or upgrade? A. That's downgrade.

Q. Now, you will notice——

Mr. Richard: We offer this, if your Honor please, in evidence.

The Court: All right.

(Testimony of Ernest H. Schoening.)

Mr. Richard: And I would like to use it just a minute.

The Clerk: Exhibit 8.

(The photograph referred to was admitted in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Deasy: May I ask one preliminary question, your Honor, before the document is received in evidence?

The Court: You want to know when they were taken, your Honor.

The Court: Were you present when these photographs were taken?

A. Both photographs, yes, sir. They were taken—yes, your Honor, they were taken by two different photographers. The two that I presented were taken immediately after the accident, at the scene of the accident; and the second one [85] was taken the second day afterwards.

Mr. Deasy: No, the one——

The Court: The cars were taken after?

A. That's right.

Mr. Deasy: The one I am particularly questioning about at this time, your Honor, is the one which the witness has just identified as showing the location of the roadway.

Q. When was this photograph taken?

A. To the best of my recollection, I think it was the next day or second day afterwards.

(Testimony of Ernest H. Schoening.)

Q. That would be either on the 9th or 10th of November?

A. November 10th, after the accident.

The Court: Were you present when that picture was taken?

A. I was.

Q. (By Mr. Richard): Now, in connection with Plaintiff's Exhibit 8, just in evidence, you will notice up here a sign on the side of the hill with the word "Park." Now, I show you this photograph which shows more of the sign, but you see a portion of it in each one, the "Park." Is that the same sign? A. That's the same sign all right.

Mr. Richard: Now, we offer in evidence the one showing the entire sign.

Q. I call your attention particularly to certain marks that [86] appear on this diagram, or upon this picture. Now this is looking in which direction?

A. That is looking east.

Q. And you will see in the right-hand lane, then, of the southbound traffic, is that right,—

A. That's right.

Q. (Continuing): —certain marks?

A. That's right.

Q. Is that correct? A. That's right.

Q. You also see upon the far side of the highway and leading across from the northbound lane, through the center lane and into the southbound lane, certain other marks? A. That's right.

Q. I will ask you whether or not you observed

(Testimony of Ernest H. Schoening.)

those marks on the highway immediately upon your arrival there? A. I did.

Q. And will you tell me——

The Clerk: The last photograph will be Exhibit 9.

(The photograph referred to was received in evidence and marked Plaintiff's Exhibit No. 9.)

Q. (By Mr. Richard): Now, I show you Plaintiff's Exhibit 4, the second photograph marked Plaintiff's Exhibit 4; and that is looking in which direction? A. Looks east. [87]

Q. In an easterly direction?

A. That's right.

Q. And in this exhibit, you will see certain tire marks upon the pavement. A. I do.

Q. Those tire marks at the east end have a curve somewhat, do they not? A. That's right.

Q. Where, with reference to the Wibye automobile, do those tire marks end?

A. They continue on to the Wibye car. That's the tire marks laid down by that particular car.

Q. The Wibye automobile?

A. By the Wibye automobile; yes, sir.

Q. In other words, those are in the southbound, right-hand lane? A. That's right.

Q. Is that correct? A. That's right.

Q. Did you measure those marks upon the highway that afternoon? A. I did.

Q. Will you give us their approximate length?

A. Approximately 33 feet.

(Testimony of Ernest H. Schoening.)

Q. Now, with reference to the right—withdraw that. There has been testimony here this morning to the effect [88] that at that location, there are three lanes of traffic, three lanes for driving.

A. That's right.

Q. With a black top covering.

A. That's right.

Q. And upon the right-hand side, there was a shoulder beyond the black top, of approximately three or three and a half feet.

A. Yes, sir; that was a paved shoulder of about three or three and a half feet.

Q. But of different material than of the black top on the top, is that correct?

A. Sometimes the same material. The term "shoulder," as defined by our department is the paved portion. It may be beyond that dirt—beside that—but there is approximately a three feet paved edge called the shoulder.

Q. Now, calling your attention to this photograph here, it would indicate that there are two parallel skid marks.

A. That's right.

Q. And where, with reference to the right-hand edge of the black top is the mark, indicating the right wheels, of course?

A. The right tire mark was on the shoulder off of what we call the paved portion of the road.

Q. Off of the paved portion of the road? [89]

A. Of the roadway; yes, sir.

(Testimony of Ernest H. Schoening.)

Q. Now there are also, are there not, upon this second photograph, marked Plaintiff's Exhibit 4, certain marks upon the other side of the highway and in the middle lane? A. That's right.

Q. Is that correct? A. That's right.

Q. Where do those marks start now? By the way, I mean the west end of those marks.

A. The west end?

Q. I beg your pardon, I mean the east end, the down-hill end.

A. The east end, they started from the north—the west bound lane, as we would term it, or the north side of the highway.

Q. The north side? A. Yes.

Q. And where did they end?

A. They circled over across the roadway, the three lanes to the south side of the highway, the shoulder.

Q. Did you mark those? A. I did.

Q. And did you measure them? A. I did.

Q. Their length is approximately how much?

A. 120 feet. [90]

The Court: Are those what you referred to as tire marks? A. Yes, sir.

Q. And it is not the ordinary tire marks, but the kind of marks that are made when the wheel skids?

A. That's right. It's tire marks made by a wheel——

Q. Has no motion?

(Testimony of Ernest H. Schoening.)

A. (Continuing): —that has been stopped; has no motion.

Q. (By Mr. Richard): Will you tell me this: Where the west end of those marks ended with reference to the two automobiles as they rested there after the accident was all over?

A. They led up to the Plymouth automobile, the government car.

Q. Now, I believe you said that when you arrived, the occupants of the Wibye automobile had been removed? A. That's right.

Q. What was the condition of the weather, as you recall it?

A. The weather was dry and clear.

Q. Was the pavement dry at that location?

A. It was.

Q. Could you tell us the approximate width—withdraw that. Those photographs indicate that the lanes were marked off by white lines.

A. Yes, sir. [91]

Q. Do you recall the approximate width of the lanes? A. Approximately eleven feet each.

Q. And then in addition to the eleven feet on the south side, I take it from your testimony there was a three foot paved shoulder, is that right?

A. That's right.

Mr. Richard: You may cross-examine.

(Testimony of Ernest H. Schoening.)

Cross-Examination

By Mr. Deasy:

Q. Having reference to these photographs which show these markings on the roadway, Mr. Schoening, that is, specifically with reference to Plaintiff's Exhibit No. 4, this is the one which shows the picture of a tow car there, was this picture taken on the day of the accident, shortly after the accident?

A. Immediately after the accident.

Q. What time was it when you arrived at the scene there? A. Approximately 4:50 p.m.

Q. Was the tow truck called by you or had it already arrived on the scene?

A. The office had dispatched the tow car.

Q. And the marks which show here leading behind the tow truck here, you say, were made by the car operated by Mr. Wibye? A. That's right.

Q. And those were made as a result of the braking of the [92] wheels, isn't that right?

A. That's right.

Q. By the application of the brakes of the wheels? A. That's right.

Q. Now, you stated there is another mark which shows more faintly on the photograph here in a curving fashion around from this south lane over into the north lane? A. That's right.

Q. Is that a similar skid mark?

A. No, it's not as heavy as a skid mark. It's a tire mark. That particular contour would be more of a skid.

(Testimony of Ernest H. Schoening.)

Q. Now this portion which shows running in a curved direction from the north over through the middle to the south lane of the highway, do you recall, Officer, whether or not that mark was such as would be made by a wheel sliding in a sideways fashion?

A. No, the other picture, it wasn't wide enough for an entire width as we would call—where you would see an ordinary tire. A tread of six inches would widen out to twelve inches.

Q. It is a fact, isn't it, that when a car slides that sidewise direction, like, for instance, the slipping on ice or on some object that causes the wheels to slide sidewise, it makes a different mark than those which are made by the tires of a car proceeding straight with the brakes on? [93]

A. That's right, on a whip would make a wider tread mark than a car going in its actual position—or not a position, but the actual method of it going around such as it shows here.

Q. Well, from your experience with the Highway Patrol, Officer, would you say that the marks which you observed which were apparently made by the government car, which I think you stated were 120 feet in length, were made by that car with the brakes on?

Mr. Richard: I think, if you Honor please, we object to that upon the grounds it calls for the conclusion and opinion of the witness. He could testify as to the appearance. I believe beyond that he is

(Testimony of Ernest H. Schoening.)

not qualified as an expert witness upon that particular point.

The Court: Well, how long have you been with the Highway Patrol? A. A few years.

Q. Have you had occasion to examine these skid marks a number of times? A. I have.

The Court: I think that is a field in which there is rather a common knowledge. I think the objection goes more to the weight of the testimony than the admissibility. I will overrule the objection. If you can answer that question—do you want it read again? [94] A. If you will, please.

(Question read.)

The Witness: I would say that the brakes were applied; because if it had been free wheeling, there would not have been any marks on the contour of that line.

Q. In other words, if the wheel were revolving, you wouldn't have had as emphatic an impression the ground as you would have in the case of where the brakes were applied? A. That's right.

Q. And those marks become more discernible and more evident if there is sufficient pressure on the brakes to stop the wheel from moving entirely? Is that what you mean? A. That's right.

Q. (By Mr. Deasy): Now Officer, when you measured these 120 foot marks, did you examine the ground in the area where the marks started in the northern lane, that is, the easterly end of this mark

(Testimony of Ernest H. Schoening.)

apparently made by the government car? Did you examine the area of the highway in that vicinity?

A. For what reason?

Q. Well, I was going to ask you, did you observe whether or not there were any oil or foreign substances there over which the wheels might have gone before making these marks?

A. That's right; we do investigate that, as our reports cover that particular situation to show whether or not road conditions have any obstructions or any debris of any kind [95] on there to cause a skid of any kind.

Q. Well, do you recall whether or not there was any foreign substance on the highway?

A. There was nothing on the highway to indicate any skidding or any reason for any skidding.

Q. Well, was there anything at all on the highway there which could have gotten on the tires and made this mark?

A. No, there wasn't; if you refer to oil or loose gravel, there was nothing like that at all.

Q. I mean any liquid or powdery substance that could have gotten on the tires and just made that as the wheels revolved? A. No, there was not.

Q. You interviewed or attempted to interview the two injured parties from Mr. Wibye's car?

A. I did.

Q. On that evening? A. That's right.

Q. Were you able to obtain any statement from them as to the occurrence of the accident?

(Testimony of Ernest H. Schoening.)

A. I have a short statement from both parties that was taken at the Fairmont Hospital some time after the accident, possibly an hour and a half or two hours afterwards.

Q. Were they in condition to talk to you at all?

A. Well, I spoke to them; yes. I asked them both what happened, to give me their reasons for the accident. [96]

Q. Were either Mr. Harold or Mr. Nels Wibye able to tell you how the accident happened?

A. Well, they both gave me a short statement.

Q. Do you recall what statement Mr. Harold Wibye gave you as to the occurrence of the accident?

A. Harold Wibye said that he passed Castro Valley and went up the long hill and started down. "I passed a car somewhere before I started to turn, and that's the last I remember." That's all I could get from Mr. Harold Wibye.

Q. What, if anything did Mr. Nels Wibye tell you?

A. Mr. Nels Wibye said that, "Going towards Bakersfield from Oakland, and I couldn't say what happened, as I was not driving. I was probably lighting a cigarette." That was the extent of what I could get from Mr. Nels Wibye.

Q. Do you recall, or do your notes show, Officer, what time you talked to them?

A. No, not at the hospital; but to the best of my knowledge, it was immediately after clearing the highway. At the time of the accident, I had to wait

(Testimony of Ernest H. Schoening.)

for the Coroner to arrive and stay there until the accident or the highway was cleared of both cars, and then I immediately proceeded to the hospital.

Q. So you think it was probably an hour or two, is that right? A. Within two hours; yes. [97]

Mr. Deasy: I have no further questions.

Redirect Examination

By Mr. Richard:

Q. Officer, you saw these men at Fairmont Hospital, not at Providence? A. Fairmont County.

Q. Between San Leandro and Hayward?

A. That's right.

Q. And I believe you told me that they had already been taken away from the scene when you first arrived at the scene of the accident?

A. That's right.

Q. And both men appeared to be pretty well banged up and pretty much hurt?

A. That's right.

Q. I just have this, if it would be of—(Showing photograph to Mr. Deasy)—I just show you a photograph that shows pretty clearly the right-hand side of the government automobile where you can see the number 142857, and ask you if that photograph fairly represents that portion of the automobile owned by the government shown in that picture as it existed immediately afterwards?

A. It does.

(Testimony of Ernest H. Schoening.)

Mr. Richard: We will offer that, if your Honor please.

The Clerk: Exhibit 10.

(The photograph referred to was admitted in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Richard: No further questions, your Honor.

Mr. Deasy: I have no further questions.

Mr. Richard: The officer may be excused, your Honor?

The Court: Yes, sir.

(Witness excused.)

Mr. Richard: May it please your Honor, I am very much embarrassed, but Dr. Fisher, who your Honor will was here ready to testify when the matter was on about six or seven weeks ago, was operating today and then it was necessary for him to go to Pittsburg on a matter where he has office hours certain days in the week, to operate up there; and I was under the impression that I would not finish with my witnesses. I perhaps anticipated something that didn't happen, that there would be an ex parte calendar this morning. There wasn't any at all. Dr. Fisher told me that he simply did not feel, in view of his duty to his patients, that he should come today, in view of the schedule of his operation. He will be here at 10:00 o'clock tomorrow morning.

The Court: You have no further witnesses?

Mr. Richard: We do not.

The Court: Are you going to have any witnesses, Mr. Deasy, at all?

Mr. Deasy: I have one witness, your Honor, but I had anticipated making certain motions with reference to the [99] case prior to putting on any evidence.

(To Mr. Richard): I am assuming that you have only the medical testimony to be added to the case?

Mr. Richard: That is correct.

The Court: Well, if you have some motion, you could make them then, if counsel is satisfied, if they have to do with other phases of the case than medical.

Mr. Deasy: Yes, your Honor.

The Court: Would that be agreeable? We could use the time on that now.

Mr. Richard: Yes, your Honor.

The Court: All right.

Mr. Deasy: At this time, your Honor, I would like to make a motion on behalf of the United States for a judgment in favor of the defendant, the United States, in each of the cases upon the grounds that the evidence is not sufficient to support the claims made by the respective plaintiffs in these cases. These suits are brought under the Federal Tort Claims Act which allow suit against the government in the United States District Court for personal injuries suffered by persons who are injured as the proximate result of the careless or wrongful act or omission on the part of an employee of the

United States while acting within the course and scope of his employment, and the only evidence presented to the Court upon the phase of the case involving [100] the employment or agency of the government employee referred to in the pleadings is the allegations in the pleadings that he was an agent of the United States, which is admitted, that he was an employee of the United States; and the allegation that he was acting within the course and scope of his employment and in line of duty at the time of the accident, which has been denied.

Now, there is some testimony here that the car involved was an olive-drab car; that it was an Army car; that it was a Plymouth; and the photographs which have been offered in evidence and received in evidence indicate that the automobile involved here was apparently an automobile belonging to the United States Army, and that it was involved in this accident. Now, bearing in mind, as in any other case, the burden of proof lies upon the plaintiff to establish the allegation of his complaint in order to entitle himself to relief, I feel that there is a failure of proof here in relation to the operation of the government vehicle at the time of the accident. It appears that the accident took place in the neighborhood of 4:40, or thereabouts, in the afternoon. The testimony of both plaintiffs and the Highway Patrol Officer places the time of the accident about that time, and there is no testimony here from anyone as to the purpose for which the car was being operated, as to whether or not the

car was actually being operated on government business, or any [101] testimony whatsoever, except what we can glean from the pleadings and from the evidence here, that Mr. Hadley was an employee of the United States and that he was driving a government automobile; at least an automobile bearing——

The Court: I thought it was admitted that Hadley was an employee of the United States.

Mr. Deasy: Of the United States; yes, sir.

The Court: Was it admitted that it was a government vehicle?

Mr. Richard: Yes.

Mr. Deasy: We will admit that, your Honor.

The Court: So that the question is whether or not he was driving in the course—whether or not the accident occurred while the employee was acting within the course of his employment or within the scope of his duty.

Mr. Deasy: Yes, your Honor. Now, I think that some burden lies upon the plaintiff to establish that fact since it is not only one of the factors essential to enable him to establish his claim, but it does in point of fact go to the very jurisdiction of the Court to hear the case, because if this man was not acting in line of duty at the time, then this is a suit which would not lie; and this Court has jurisdiction to hear this type of suit only where there is, in fact, an injury caused by a person acting within the line of duty. [102]

Now, as to whether or not there was any negli-

gence on his part, the only evidence which is before the Court is the evidence of the photographs and the testimony of Mr. Harold Wibye that this automobile came over onto the other side of the road. As to how it happened to come over onto the other side of the road, there is no evidence at all.

The Court: Well, of course, that's sufficient *prima facie*. The evidence is sufficient *prima facie* to establish negligence if the man was in the course of his employment at the time. The testimony of Mr. Harold Wilbye would be sufficient.

Mr. Deasy: Yes, your Honor, I might say in that regard that there is nothing before the Court to establish whether at the time that this impact occurred, or the time that this automobile came over suddenly from its own proper portion of the highway, into the other portion of the highway. There is nothing before the Court to show whether or not Mr. Hadley was alive at the time that this car suddenly came over to the other side of the road.

The Court: That would be something to require the proof of the negative testimony. It would be impossible for anyone to, except by some possible expert method testimony; but that has nothing to do with the *prima facie* of the case.

Mr. Deasy: No, but it has connection with the other point which I have mentioned. [103]

The Court: The other point is entirely a different matter but I don't think there is any matter in the point that there hasn't been any proof of negligence; that is, a *prima facie* case of negligence has been

made. You wouldn't want any clearer case. If a man drives down the right side of the highway and the man cuts directly in front of him in the middle of the highway, I wouldn't want any stronger case of negligence itself; but the other point is a different matter. I have been wondering about that. What is your point of view with respect to that matter, Mr. Richard?

Mr. Richard: If your Honor please, it is simply this: Now, I am sure there is no misunderstanding. The defendant admits that the automobile belonged to the United States Government; that Hadley was the employee of the United States Government at that time.

The Court: No, he didn't say that.

Mr. Richard: Yes, Hadley was the employee of the United States Government at the time, so the question which is left is whether or not he was in the course of his employment.

The Court: You haven't quite correctly stated it. The Government has admitted it was a government automobile and that the dead man was an employee of the United States?

Mr. Richard: That's right.

The Court: Now, whether he was in the course of his employment at the time of the accident is the issue which they have denied. [104]

Mr. Richard: That is correct.

The Court: Yes.

Mr. Richard: Now there is one other thing. As your Honor has mentioned, I have a certified copy

of the death certificate of this man, showing that the cause of death was shock and hemorrhage due to numerous fractures of the ribs and lacerated liver and right kidney, that I would be glad to offer in evidence, if your Honor desires it.

The Court: You can offer it, but that doesn't add anything.

Mr. Richard: Except I think it does go to the question raised by him as to whether or not the man was alive. In other words, that shows a trauma was the cause of his death. That is my opinion.

Now, if your Honor please, going to the other point——

The Clerk: Are you offering this?

Mr. Richard: Yes, we do.

The Clerk: Exhibit 11.

(Certificate of Death of John Elliott Hadley was then admitted in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Richard: If your Honor please, where we have the ownership of the automobile and the employment admitted or proved—in other words, we have shown here the automobile belongs to the United States Government; that the driver of that automobile was an employee of the United States Government, [105] and in such a situation an inference arises, a presumption arises in which it is proof in the effect that that man was in the course of his employment at the time it happened.

I call your attention first to the case of Bushnell versus Washika Tashiro. The citation is 115 Cal.

App. 563; *Westberg versus Wilde*, 14 Cal. App. 14 Cal. 2nd, 360.

The Court: 14 Cal. Second?

Mr. Richard: Yes, 360. A very late case in 1941, *Shields and Jenkins versus Oxnard Harbor District*, 46 Cal. App. 2nd, 477.

And I think there is a very good statement in the first case I cited, the *Bushnell* case. The decisions are uniform in holding that in an action for damages against an employer for physical injuries caused by the negligence of his employee while operating the employer's automobile, proof that the automobile belonged to the employer, and at the time of the accident was being operated by the employee, raises an inference sufficient to establish a *prima facie* case that the automobile was being operated by the employee under the authority of the employer and within the scope of the employment, and that the burden is then upon the defendant to overcome or dispel any such inference by proof of facts to the contrary. Among the numerous cases so holding are: 35 Cal. App. 39 Cal. App., 89 Cal. App: ". . . and it is further held that such inference is not destroyed or overcome as a [106] matter of law because it is contradicted by the testimony of the employee or of other witnesses produced on behalf of the defendants, but that the issue remains one of fact for the determination of the jury." In other words, it is the same inference that we find in the *Shelly* case against Southern Pacific in the line of cases in California upon that line on the presumption of due care.

In the recent case of Shields and Jenkins that I mentioned, there is the same holding, and they hold there that: "the presumption arises and the testimony of the employee himself that he was not in the course of his employment does not dispel the inference as a matter of law but merely creates conflict."

In Westberg versus Wilde, which of course is a leading case upon the proposition of the continuing presumption, there is this statement made: ". . . in refusing to recognize the verdict for him on the grounds that Wilde was not acting in the course of his employment where the accident took place. The fact that Wilde was an employee of Talsky, driving the car owned by him, gives rise to an inference that Wilde was acting within the course and scope of his employment."

Citing 1 Cal. App. 2nd, 151; Cruz vs. White Brothers, 91 Cal. App. 86; Moppin vs. Solman, 41 Cal. 323, which are cases different than the ones that are cited in the [107] first case that I read to your Honor: "This inference is not dispelled as a matter of law by the evidence to the contrary." Then, simply calling your Honor's attention to this, certainly that under the rule of Erie Railroad versus Tomkins, 304 U. S.—"It is certainly the law that"—I don't have to go to the Erie case; the statute itself says that the United States would be as if it were a private person under the laws of the State.

Section 401A of the Tort Act itself is the one that so provides.

The Court: Except there is one question that has arisen in my mind concerning this matter, Mr. Richard, and that is, ordinarily the liability of the United States under the Tort Claim Act is itself liable as if it were a private person and has a liability as a private person under the laws of the State where the tort occurred. That is, in effect, what the statute says. The statute does, however, in establishing the liability of the United States, say that it shall only be liable for the acts of its agents committed in the course of its employment.

Mr. Richard: That's very true.

The Court: And it may be that the mere rule—that the rule of proof required under the rule of inference, or evidence under the state law might not be sufficient to satisfy the specific requirement of the statute that the [108] United States shall not be liable unless except upon proof that the employee was acting within the scope of his employment or within the call of duty.

Mr. Richard: Yes, I understand. In other words, then, your Honor would necessarily take the position that because there was a statute in this case that you had to go farther than the established common law or case law of any particular state.

The Court: Well, whether or not an inference would be sufficient under that statute, I just say that I have never had that question as yet and I don't know that there are any decisions on that, and there is some question that arises in my mind——

Mr. Richard: But, as far as that is concerned, we rest this motion upon this authority, if your Honor please.

The Court: Yes. Have you anything to say on that?

Mr. Deasy: No, your Honor, only this: That, as your Honor's remarks to Mr. Richard just indicated, my feeling with regard to this is that it is incumbent upon the plaintiffs under the Tort Claims Act to prove that, as a matter of fact, the government employee was acting within the line of duty, because the whole basis for liability of the United States rests upon that situation; only where there is the act of an agent or an employee, I should say, acting within the actual course and scope of his employment or in the line of duty. [109]

Now, it is all very well, that in the State of California, there are decisions in suits between private parties, certain inferences arise from the fact that a man is driving another man's automobile, and there is a relation of employer and employee there that a prima facie case can be made out by mere proof of those facts that an inference or presumption arises that he was on the employer's business, but I don't understand the Tort Act to contemplate such a situation where the mere proof that a man, for example, a soldier in the United States Army, is driving an Army car, that the mere proof of that establishes a prima facie case of his acting within the line of duty, because that goes to the very heart of it.

The Court: It goes to the question of the substance of liability, particularly in a case as this is, of course, where there is a waiver of some immunity and where there has to be a strict construction of the statute where the United States consents to be sued. I think there is a little more to this question than just the rule of evidence under California law. I am not saying that you are wrong about that, but I think there is a little more to it than merely the question of whether or not the rule of evidence that is applied in California as between private parties necessarily would be sufficient to sustain the burden of proof under [110] the Federal Tort Claims Act. I think not of this precise question, but the question of whether or not there have been some cases—I had one that you tried, Mr. Deasy, involving that ulcer case.

Mr. Deasy: The malpractice case that happened out where an operation was performed at one of the government hospitals.

The Court: Yes, but if your Honor please, isn't there the question one of ostensible authority? There isn't any question that that does not exist, but that question does not arise here. In others words, as I understand that case there was a question——

The Court: That case is not authority; it doesn't go into the question that we have here.

Mr. Richard: Yes.

The Court: I merely referred to it because there, I did go into the question of what constitutes

scope of employment and only is indicative of the fact that there is rather a strict construction under the Federal Tort Claims Act when it comes to the question of scope of employment.

Mr. Richard: But didn't that arise because of the fact that the person who was operated upon was not that class of person whom, under the statute, was entitled to the treatment?

The Court: That's right, that would be very true.

Mr. Richards: That goes more to the question, of course—the doctor says, “Yes, you come in and you be operated on,” [111] and there was apparent authority existing. I fail to see where there is an analogy between the two situations.

The Court: No, I wasn't intending to indicate that there was any analogy between the two situations. I merely cited that because there has been some considerable number of cases on the question of jurisdiction of the court arising in connection with the matter of limits of authority and scope of employment; and to the extent that it might be considered as a jurisdictional question, that was all that I was intending to say, that there might be more to it than simply the question as to whether or not this rule applies in California. There is no doubt of it that it is sufficient for a *prima facie* case. As to whether or not that satisfies the jurisdictional question where the liability of the United States for the act of an agent committed within the scope of his employment is involved, you have a little diverent question than you have in the private

cases, because when you have the Common Law doctrines or the cases which construe statutes in tort matters, you would there have a different question entirely. A man in business has got an automobile and he uses it in the course of his business and his driver is using it and someone is injured, you have there a reason for this presumption and inference that you have cited; but when the United States announced that it was going to assume the liability and give up its sovereign [112] immunity to suit, it was specific in stating that it was only in those cases where it was shown that the man was acting in the scope of his employment; so that there may be more of a question of substance rather than rule of evidence involved there, and it may be that upon study, that this rule of evidence is sufficient to satisfy. That, I am not attempting to decide here at the moment, but I think that both of you should think it over a little bit and we will submit the question with the case, and we will go ahead and take the evidence. I am not going to rule upon it; I will reserve ruling, but I think that, considering the serious nature of the claims involved in this case, it would be well to give some study to that question.

Mr. Richard: Yes, your Honor.

The Court: Because, if you are right, and if I decided this case in favor of the plaintiffs and make an award in that case and find out afterwards that you might have said at the time that you didn't mean——

Mr. Richard: That's right.

Mr. Deasy: If your Honor please, is it your Honor's *attention* that this motion should be submitted at this time and deferred until——

The Court: I will defer ruling on the motion until the case is decided and decide it with the case, so that tomorrow, you can put the testimony on, if you wish. [113]

Mr. Deasy: I have a witness whose testimony will only take a matter of minutes.

The Court: Is there any objection to putting him on out of order?

Mr. Richard: No.

Mr. Deasy: But seeing that the plaintiff's case is completed with the exception of the medical, may I, without prejudice to the motion, call this witness, your Honor?

The Court: Do you have any objection to that?

Mr. Richard: None whatsoever.

The Court: Very well.

Mr. Deasy: Mrs. Fipps.

EDNA D. FIPPS

called by the defendant, sworn.

The Clerk: Please take the witness chair. State your name to the Court.

A. Edna D. Fipps.

Direct Examination

By Mr. Deasy:

Q. Where do you reside, Mrs. Fipps?

(Testimony of Edna D. Fipps.)

A. In San Francisco.

Q. How long have you lived in San Francisco?

A. Oh, for many years; probably thirty years or more.

Q. In November of 1946, where were you living in San Francisco?

A. I was living at 618 17th Avenue. [114]

Q. In San Francisco?

A. In San Francisco; yes.

Q. And you are the mother of John E. Hadley who has been mentioned here, is that right?

A. Yes, I am.

Q. And you know the day on which he was involved in an accident was on the 8th of November, 1946?

A. Yes.

Q. When was the last time that you talked to him?

A. Well, it was on Thursday, November 8th.

Q. That is, the date of the accident?

A. No, I mean November 7th. I beg your pardon, it was on November 7th, but he 'phoned me from Stockton saying that he would have——

Mr. Richard: No, now just——

Q. (By Mr. Deasy): He called you from Stockton, is that right?

The Court: That was the day before the accident?

A. Yes.

Q. (By Mr. Deasy): What was his employment at that time?

A. Well, he was liaison representative for the——

(Testimony of Edna D. Fipps.)

The Court: Where was he stationed?

A. I think it was the Quartermaster Depot in Stockton, California, but he resided, though, in Seattle, I mean he was stationed there and he did this work; but the Stockton [115] Depot, I think, was the main one; and he had to report there every three months or so; and that's what he was doing when he was here. He was to report at the Depot at Stockton.

Q. (By Mr. Deasy): And he 'phoned you from Stockton, is that right? A. Yes, he did; yes.

The Court: I think I will strike that answer out that he had to report there, because that is a hearsay statement.

The Witness: How?

The Court: I merely wanted to find out from the witness—I merely asked the witness where her son was stationed and she said he was stationed in Seattle, worked for the government out of Seattle. That's what she said.

Mr. Deasy: I believe, your Honor, that the Stockton Depot is a sub-depot of the General Quartermaster Depot in Seattle, or some such arrangement of that kind.

Mr. Richard: I don't know.

The Witness: I absolutely know he was here on business. I know that's what he reported.

The Court: I wish you wouldn't volunteer these statements, because I have an important case to decide; and don't make any statement about a matter

(Testimony of Edna D. Fipps.)

of that kind, because then you are arguing and you get something into my mind that I shouldn't have that isn't competent. As a matter of fact, you don't know that, except what somebody told you. That's [116] fairly right, isn't it? You say you know he was here on business. You only know that because somebody told you that. The Government of the United States didn't tell you that, did they?

The Witness: I know what they decided.

The Court: It was because somebody told you that. A. No, I have it in writing.

Q. (By Mr. Deasy): He called you sometime on the day before the accident from Stockton, is that right? A. That's right.

Q. What time of the day was that?

A. Well, I should say it was between three and four o'clock. I don't know exactly the time but between three and four in the afternoon.

Q. And at that time, did you make an appointment to meet him?

Mr. Richard: Now, just a minute. That's calling for the content of the conversation, I presume, which is hearsay. I object to it upon that ground and as incompetent, irrelevant and immaterial.

The Court: What was the point of this, Mr. Deasy?

Mr. Deasy: Well, your Honor, my understanding is that this lady did have a conversation with her son, the purport of which would disclose what he was doing at the time that this accident occurred,

(Testimony of Edna D. Fipps.)

and goes to the point of whether or [117] not he was engaged upon his business at that time.

The Court: Do you mean that you have in mind to show that at the time of this accident he was on the way to keep an appointment with his mother?

Mr. Deasy: Yes, your Honor. In view of the fact that the government employee himself is deceased and this lady is in a position to throw some light on the purpose of the trip which was being made, I think it is competent evidence.

Mr. Richard: If your Honor please, as far as the government is concerned, is it not a self-serving declaration? It is not a statement against interest as far as the individual is concerned, neither pecuniary nor proprietary, or subject to the hearsay rule. The man being dead, I mean if that is the testimony, where is the——

The Court: I think that I shall allow the witness to testify only as to whether or not—as to when and where, if she did have, she had an *appoint* with the son, even though it is based upon the conversation that she had; but no further than that.

Mr. Deasy: No, it was not my intention to elicit any conversation as to anything he may have said as to his plans as to whether he was coming or going——

Mr. Richard: Now here. In other words, you want to get in what you want and then I can't cross-examine her on anything. [118]

Mr. Deasy: You can cross-examine her on anything.

(Testimony of Edna D. Fipps.)

Mr. Richard: Well, if that is the case, let's let it go. I will withdraw my objection.

The Court: Well, now, the question is now whether or not the last question that was asked the witness was the substance in subject. She had an appointment, had made an appointment to meet her son.

(To the witness): You may answer that yes or no.

The Court: All right. Then the next question is?

Q. (By Mr. Deasy): As to when and where the appointment was made.

A. I expected him around 6:00 o'clock. He was having dinner with me that evening.

The Court: You had made an appointment for him to have dinner with you that evening at 6:00 o'clock?

A. That's right.

Q. That is, the evening of the day before the accident?

A. That was the day of the accident.

Q. I see; the evening of the day of the accident.

A. Yes; the evening of the day of the accident.

Q. (By Mr. Deasy): Where was he to have dinner with you?

A. At 618 17th Avenue where I was residing at the time.

Q. That was your home?

A. Yes; that's right.

Q. And what time did you say the appointment was for dinner? [119]

A. 6:00 o'clock.

Mr. Deasy: I have no further questions.

(Testimony of Edna D. Fipps.)

Cross-Examination

By Mr. Richard:

Q. Mrs. Fipps—is that correct, Fipps?

A. Yes; that's right.

Q. (Spelling): P-h-i-p-p-s?

A. (Spelling): F-i-p-p-s.

The Court: Mrs. Fipps, I don't want you to think I was being harsh with you before. I just have to be careful that you don't testify to anything that you don't know of your own knowledge.

The Witness: I see.

The Court: Go ahead, counsel.

Q. (By Mr. Richard): Do you reside at this same address now?

A. No, I reside at 1427 Filbert Street at the present time.

Q. Now, do I understand that, between 3:00 and 4:00 p.m. on Thursday, November 7th, that you had this conversation? A. That's right.

Q. That was conversation between your son and yourself? A. Correct.

Q. Were you at home when this call came?

A. Yes.

Q. And at that time, you had a telephone in your home or apartment? A. Yes. [120]

Q. How long had it been since you had last seen your son?

A. Oh, it had been several months, and I haven't seen him since he had been assigned to Seattle which,

(Testimony of Edna D. Fipps.)

I think, was the latter part of May, I think, he had to report there—June first, and I hadn't seen him since he had left for Seattle.

Q. Had you had a telephone conversation with him during that interval? A. During the——

Q. Before the one on Thursday of November 7th?

A. Well, he called me Wednesday the 6th of November saying he was supposed, in the first place, to come on Thursday the 7th but he hadn't completed his work yet, and the object of the 'phone call on Friday, November 6th was—or I mean, Thursday, November 7th, was to tell me that he would be there on Friday, the 8th; that he couldn't make it this Thursday, because he hadn't finished his work yet.

Q. In other words, he called you on Wednesday and told you that he would come over on Thursday?

A. That's right.

Q. Then he called you on Thursday and said that he would not be able to complete his work at Stockton on Thursday? A. That's right.

Q. And he would come on Friday?

A. That's right; that's perfectly right; perfectly straight. [121]

Q. Did he tell you in the conversation that you had with him on Thursday as to when he would complete his work in Stockton?

A. Well, he was supposed to have completed it then in time to come down Friday, to come to San Francisco.

(Testimony of Edna D. Fipps.)

Q. In other words, that was all you know, that he said that he would get through up there in time so that he would come down in San Francisco and have dinner with you?

A. Yes, on Friday, on his way home. He was on his way back to Seattle.

Q. All right. Now, did he say to you or indicate to you that he had any other business in San Francisco than come down to have dinner with you—I mean, or on the way down from Stockton that he had any business?

A. Well, he did mention that he had some business at the Finance Office in San Francisco; that he was stopping by there.

Q. Now, when did he tell you that?

A. On Thursday.

Q. In the telephone conversation?

A. That's right; Thursday.

Q. In the Finance Office in San Francisco?

A. That is correct.

Q. Can you paraphrase——

A. I beg your pardon?

Q. (Continuing): ——that portion of the conversation that you had with him in which he said that he would be down in [122] time to have dinner with you? A. Yes.

Q. Can you paraphrase it? Could you tell us the substance of it?

A. Oh, well, he said that he would be delayed, but he hadn't gotten through as quickly as he had

(Testimony of Edna D. Fipps.)

expected to, therefore, he could not keep the appointment on Thursday, but that he would be down Friday.

Q. All right. He would be here in time for dinner about 6:00 o'clock?

A. Yes; that's right.

Q. Now, can you paraphrase that portion of the conversation in which he mentioned that it was necessary for him to call at the Finance Office?

A. That's right.

Q. All right, can you paraphrase that?

The Court: He means, what did he say about that?

The Witness: Well, he said—I will just have to think a minute because I haven't thought about that so much; but he said, "I want to call at the Finance Office, as I have some business I want to transact with them." That's what he said.

Q. (By Mr. Richard): That is the substance of it? A. That is the substance of it.

Q. All right. Now—— [123]

A. (Continuing): ——But I don't know the nature.

Q. What.

A. I don't know what he wanted to do.

Q. All right; that is what he told you?

A. That's what he told me.

Q. Now did he—withdraw that.

Mr. Richard: Could I see that itinerary that we discussed up in your office?

(Testimony of Edna D. Fipps.)

(Mr. Deasy hands to Mr. Richard a document.)

Q. (By Mr. Richard): Now, in this conversation that you had with him on either of these days, was anything said by him as to where had to be after he left Stockton?

A. Well, he said that he had to be in Seattle on the 11th of November.

Q. On the 11th of November?

A. Yes, on the 11th of November.

Q. Your son met his accident, did he not, on a Friday?

A. The 8th of—

Q. The 8th of November?

A. Yes.

Q. And he told you that he had to be back in Seattle on the 11th?

A. The 11th.

Q. Which would be the following Monday?

A. That's right. [124]

Q. He had been an employee of the United States Government for some considerable time?

A. Yes, he had, ever since he was released from the Army. He was in the Army, of course, during the war; and as soon as he was released—he had worked *before* the government before he went into the Army, however, and he went back. He was a Civil Service employee, of course; and as soon as he was released from the Army, he went back to be a government employee again.

Q. Approximately when was he released from the Army?

A. Oh—

Q. 1945?

(Testimony of Edna D. Fipps.)

A. I think so; I can't just exactly remember.

Q. As far as you know, he had no other employment than for the United States Government at that time? A. No.

Q. Do you recall whether or not—when you stated that he had to call, did you say “Finance”?

A. Finance.

The Court: Finance Office, she said.

Q. (By Mr. Richard): Finance Office?

A. That's right.

Q. Of the Government or the United States?

A. Well, it was the United States Government Finance Office—I presume it was. [125]

The Court: He just wants to know what he said.

Q. (By Mr. Richard): Did he use the words?

A. I would say the words, “Finance Office.”

Q. Finance Office? A. Yes.

Mr. Richard: I have no further cross-examination.

Redirect Examination

By Mr. Deasy:

Q. Mrs. Fipps, with regard to a portion of the conversation with relation to stopping at some Finance Office, do you recall whether or not your son said it was for the purpose of picking up a check?

A. He did say something about a check. I don't know whether it was cashing a check. I think it was that he was going to cash some checks there, but whether that was all of it, I don't know.

(Testimony of Edna D. Fipps.)

The Court: Well, we have to be careful to distinguish between what is conversation and what isn't in connection with this testimony.

Q. Did your son say that he was going to cash a check at the Finance Company? A. He did.

Mr. Deasy: I have no further questions.

Recross-Examination

By Mr. Richard:

Q. Well now, in your last answer, you said something about picking up a check. [126]

A. Well, he didn't say anything about picking up a check; he did say something about cashing a check, though.

Q. But you don't remember what it was?

A. Well, I don't remember definitely. He said he was going to cash a check there, but——

Q. That is all you remember about that portion?

A. That's all that I remember about that; yes.

Mr. Richard: I have no further questions.

Mr. Deasy: No further questions.

The Court: That is all.

We will take a recess then until tomorrow morning at 10:00 o'clock; and then you will have the doctor here then?

Mr. Richard: Yes, sir.

(The court was then adjourned until 10:00 o'clock a.m., July 29, 1949.) [127]

Friday, July 29, 1949, 10:00 o'clock a.m.

The Clerk: Wibye versus the United States.

Mr. Deasy: Ready.

Mr. Richard: Ready. Dr. Fisher.

LLOYD D. FISHER

called by the plaintiffs, sworn.

The Clerk: Please take the witness chair.

Direct Examination

By Mr. Richard:

Q. Your full name is Lloyd T. Fisher?

A. Lloyd D. Fisher.

Q. And you are a duly and regularly licensed physician and surgeon? A. Yes, sir.

Q. Admitted to practice in the State of California? A. Yes, sir; I am.

Q. And you maintain your office where, Dr. Fisher? A. At 447 29th Street, in Oakland.

Q. Of what institution or institutions of learning are you a graduate, Doctor?

A. The University of California Medical School.

Q. And when did you finish the University of California Medical School?

The Court: Is there any question about the qualifications of the Doctor, Mr. Deasy? [128]

Mr. Deasy: I don't believe there is, your Honor, although I have never seen the Doctor before that I recall; but I will stipulate that he is a duly qualified physician and surgeon licensed to practice in

(Testimony of Lloyd D. Fisher.)

this state, and that he may testify as to the treatment that he afforded in this case.

Mr. Richard: If I might just ask a few questions, then:

Q. Do you specialize in any particular branch of medicine or surgery, Doctor? A. Yes, I do.

Q. What particular branch?

A. In orthopedic surgery.

Q. Orthopedic surgery is what, particularly?

A. Orthopedic surgery is that branch of medicine which deals with diseases and abnormalities of the muscular, skeletal system; that is, the bones, joints, ligaments, tendons.

Q. All right. Now, since your graduation, will you tell us briefly where you have practiced before opening up your offices in the City of Oakland?

A. Well, I trained, following graduation, in orthopedic surgery, one year at San Francisco Hospital; one year in Baltimore; two years at Charlottesville, Virginia, and the University of Virginia Hospital; and one year in teaching orthopedics on the University of Southern California Medical School Staff, in Los Angeles; and following that, I was—I have [129] been in Oakland at various locations.

Q. You opened your office in Oakland when?

A. Well, I first came to Oakland with the Permanente Hospital.

Q. In the orthopedic department?

A. Yes; and as orthopedic surgeon. And follow-

(Testimony of Lloyd D. Fisher.)

ing that, I have been in offices for myself. Let's see; it's since '45.

Q. All right. Are you a member of the staffs of any hospitals in the San Francisco East Bay Region? A. Yes, sir.

Q. And if so, which ones, please?

A. The Merritt Hospital; Providence Hospital; Childrens Hospital of the East Bay; Herrick Memorial Hospital; Alta Bates Hospital; the East Oakland Hospital; Alameda Hospital; Fairmont Hospital, and Highland Hospital.

Q. Fairmont and Highland Hospital are County Hospitals of the County of Alameda, is that right?

A. Yes, sir.

Q. Doctor, did you have occasion on or about the 8th day of November, 1946, to see Mr. Harold Wibye and Mr. Nels K. Wibye professionally?

A. Yes, sir; I did.

Q. Now which file do you have first, so at your convenience take them up that way?

A. Well, I have Mr. Harold Wibye's right at hand. [130]

Q. Where did you first see Harold Wibye?

A. I first saw him at the—I think I first saw him at Providence Hospital.

Q. Providence Hospital? A. Yes.

Q. On the evening of November 8th, what time did you see him? Was it before midnight?

A. Yes, sir.

Q. And did you at that time make an examination? A. Yes, I did.

(Testimony of Lloyd D. Fisher.)

Q. Will you tell us what your examination consisted of and what it disclosed, sir?

A. He had lacerations of his face; had lacerations of both knees, that is, penetrating the skin, subcutaneous tissue and the bone covering of the kneecap, exposing the kneecap on both sides. These were about four inches long, each of them; and he also complained of pain in his head and his neck and in his chest; and there was marked tenderness about the base of his skull in back and down his neck.

Q. Did you find spasm there?

A. There was a lot of muscle spasm, and also over the left shoulder, over the clavicle and over the head of the humerus, and he also had tenderness in his left chest in front up high and back near the scapula.

I had x-rays made of his left clavicle—that's the collar bone; of both knees; of his skull; and of his ribs.

Q. And those X-rays show, do they, any bony fracture of the bones or——

A. No.

Q. (Continuing)—abnormality?

A. No, they didn't. The only thing that they showed that was abnormal was in the bone—was a small metallic foreign body over the—in the jaw. One of the films showed the jaw. There was a metallic body under the skin.

Q. But you learned from the patient, Doctor, that was some thing that happened sometime before this accident?

(Testimony of Lloyd D. Fisher.)

A. It happened previously; yes, sir.

Q. All right. When you first saw him, was he in a condition of shock?

A. He wasn't in true surgical shock in the sense that his blood pressure was down, but he was in a state of nervous shock. I mean he was upset, disturbed, and in pain.

Q. Did your history disclose a period of unconsciousness?

A. Yes, the evidence showed that there was at the time of the accident; but, of course, when I saw him, it was later when he was conscious.

Q. Did you call in any neurologist?

A. Yes, I did because of the pain in his neck and the head injury which he had obviously had, and the pain going down his left shoulder and arm. I requested Dr. N. C. Norcross who is a neurosurgeon, to examine him. [132]

Q. Was there any complaint of the eyes?

A. Yes, there was. I was trying to think what they were at that time. I know what they are since very well, but—I don't recall exactly. There wasn't anything in the eye to look at it, as I recall; but he had pain radiating around the left side of his head particularly, and into the region of the left eye. I remember that distinctly.

Q. All right; and he has testified that he spent a period of about eight days, I believe, the first time in Providence Hospital.

A. Yes, sir.

Q. And he was under your care during that entire time, was he, Doctor?

A. Yes, he was.

(Testimony of Lloyd D. Fisher.)

Q. And after leaving the hospital, you continued to treat him, did you? A. Yes.

Q. Were the complaints after leaving the hospital generally about the same as the complaints that you found upon his admission in the first examination?

A. Yes, in general; but there was sort of a transition which took place; the pain going down the arm gradually subsided, whereas, the pain in the neck seemed to become more intensified; and as it eventually turned out, the neck trouble has given him—the neck injury has given him much more trouble [133] than the pain down the arm, which is gone.

Q. Was physiotherapy prescribed by you, Doctor? A. Yes, it was.

Q. And later on, neck stretching prescribed?

A. Yes; he had heat and massage; he had neck stretching—I had him in the hospital for a period of neck stretching as well, and then I got him to purchase a halter to use at home to stretch his neck; and because of his eye complaints, I also had him see an eye doctor. He didn't find anything within the eye itself which would explain the symptoms.

Q. I believe he saw Dr. Nutting? A. Yes.

Q. I believe he also saw Dr.—

A. Thomas Newman.

Q. Dr. Nutting and Dr. Gump are associates, are they not? A. Yes, that's right.

Q. Now, off and on since the time of the hap-

(Testimony of Lloyd D. Fisher.)

pening of this accident, you have treated him, I assume? When did you last see him, Doctor, for examination and treatment?

A. I last saw him June 14, 1949.

Q. And were there still complaints present?

A. Yes, at that time.

Q. Did you examine him at that time also?

A. Yes, I did.

Q. And will you just tell us as late as June, 1949, what [134] you found and what he complained of?

A. Well, he complained of ringing in his ears all the time, but predominantly at night; said that about once or twice a week he got a throbbing or pulsating feeling in the middle of his neck in the back and that an electric pad on it for about two hours seemed to relieve it, and when he had the heat on there, he could feel the pulse beat in the back of his neck; and that he still had the complaint of the pain across the left temple, running up from the base of the skull around in the left temple; and complained that there was a little lump there in the back and that when he pressed on it, he had a burning sensation and it was sore.

He said that he was still very nervous, particularly when he rode in a car. He also complained of pain in his upper back between his shoulder blades on any sudden or sharp movements and that there was a burning sensation there at times. Also complained of pain lower down in the back, which seemed to come right through the chest and that he

(Testimony of Lloyd D. Fisher.)

gets an occasional pain there like an electric shock.

Q. Did he complain of any trouble with his eyes?

A. Yes, he did. He said that—as he put it—his vision fluctuated. He said that at that day, one day he could read and then the next day maybe he wasn't able to hold it on the print.

Q. Now, what would you attribute that condition to, Doctor? [135]

A. Well, I believe that's due to his neck injury. I have seen it many, many times. The mechanism there, as I picture it, is this: That, as a person reads, they follow the lines from left to right with their neck, principally, and the up and down motions with their eyes. When you have spasm in neck muscles, the muscles tend to prevent free and easy motion of the neck. The eyes try to take over, and those small eye muscles fatigue, very quickly so, and unequally, so that they no longer give you binocular vision, they don't focus the same and then you get the sense of blurring; and when they blur, the water, and of course, the patient thinks that his eyes are bad where, actually, it is not within the eye, it's the extra-ocular mechanism, you see.

Q. Does he complain of loss of sleep at the present time?

A. Yes, he said that in an attempt to get sleep, he will go to bed early and stay late, but that usually about two or three a.m., he tosses and turns and will have to get up and walk for a while and then he can't get back to sleep.

(Testimony of Lloyd D. Fisher.)

Q. Now, did you, upon this last visit, make an examination from an orthopedic standpoint; that is, in addition to his complaints, did you examine him?

A. Yes, that's right, I examined him.

Q. And what did that disclose of interest?

A. He had a great deal of tenderness in the back of his neck still. It was maximum in the mid-cervical region to [136] both sides. In other words, right across the curve of the neck and on both sides of the midline. He had more tenderness on the left than he had on the right.

Q. Do you find spasm there at the present time?

A. Yes, he still had some spasm. It wasn't as marked as at the time of his original injury, but he still had some muscle spasm.

Q. Now, there has been a period of two years and approximately nine months elapse since the date of this injury. You learned, did you not, that this man had been engaged in construction work for a number of years?

A. Yes, I did.

Q. Now, in view of the length of time of your examinations, your treatment and so forth, and his complaints, what is your prognosis as far as this neck condition is concerned, Dr. Fisher?

A. Well, frankly, I think he has a condition that has been chronic for two years. It is a very difficult problem of treatment, and he has had a lot of treatment and some relief, but not complete relief. It might be possible that if he were subjected again to rather intensive treatment, possibly traction in the

(Testimony of Lloyd D. Fisher.)

hospital for a couple of weeks, and injection over the points of maximum tenderness with pricaine that it could be improved some, but I don't think now that the prognosis is very good as to complete recovery. I doubt [137] very much whether he will ever have complete relief, and it will be up and down somewhat. He will have days better and times when it is considerably worse.

Q. Doctor, would you recommend a course of treatment with hospitalization?

A. I think I would. It's gone that long and he still has a great deal of trouble sleeping. Sometimes, generally two to four hours of sleep he will lose for several nights in a row.

The Court: What is the nature of the injury or condition of his neck? You have described what his complaints are, but what is it?

A. It is a cervical strain. It doesn't—the word “strain” doesn't seem to connote very much. He doesn't have a fracture—at least as far as we can determine. He has had a number of X-rays of his neck. But we see that not infrequently. It consists of multiple small tears in the muscular and ligamentous structure about the neck; and of course the neck is one of the most mobile parts of the body. It is always moving and thousands of times a day, and it is almost impossible to keep it entirely still; and if you do immobilize it for a period of several months like we have to do with fractures occasionally, then it is quite stiff and it takes a long time to

(Testimony of Lloyd D. Fisher.)

get it limber again. So long as it is stiff, it still gives a little pain. As I say, I have seen any number [138] of these neck cases and they are really tough to treat, and so many of them go on to have permanent trouble.

Q. What in your opinion Dr. Fisher, would be a reasonable charge for treatment and hospitalization such as you indicate?

A. Well, you can figure about \$100 a week in the hospital.

Q. How much?

A. About \$100 a week for hospitalization, and the other treatment would be probably another \$150, probably—\$350.

Q. Dr. Fisher, in view of his trade, in your opinion, is he disabled at the present time from engaging in the work that he was engaged in at the time of the accident and for a long time prior thereto?

A. Yes, I think he is, for this reason; that he hasn't the endurance. I mean, when you use the shoulder muscles, some of which are derived from the neck, the trapezius and the scapulae, and several other muscles; and when you do work with your arms for a time, then the neck is irritated. You get an increase in the amount of pain. Whereas he probably could do something light, I doubt if he could do the heavy work that he was doing; certainly not for an eight-hour day, day after day.

Q. Now, Dr. Fisher, you spoke of the condition of both knees when you first saw him, and indicated the length of the abrasions and so forth. [139]

(Testimony of Lloyd D. Fisher.)

A. Yes, I did.

Q. He demonstrated here yesterday on his right knee, I believe, what would appear to be a projection or a bump as he bends his knee here on the knee itself. Is that significant?

A. Yes, it is. That as I believe, is the result of the injury he had; that and the laceration, which, as I described it, cut into the periosteum, the bone covering; and when you raise the bone covering and get bleeding underneath, as that heals, it lays down new bone; and I believe that—unfortunately, I haven't X-rayed that knee recently—but a lateral view would probably show that there is a projection of bone there. If it isn't bone, then of course it has to be scar tissue; but whichever it is, it could be cut out, and there is some chance it might recur, but probably you could cut it out and get relief.

Q. Did he complain of pain or inability to kneel on that particular knee?

A. Yes, he did say that, that he couldn't, that he couldn't kneel on it. It doesn't hurt him walking, particularly, but if he goes to kneel, he is kneeling on one spot which is painful.

Q. Now, in your opinion, is that condition permanent?

A. Well, yes. Oh, that won't change unless you change it surgically. [140]

Mr. Richard: Now may I have that typewritten exhibit there?

Q. Dr. Fisher, I believe you made certain

(Testimony of Lloyd D. Fisher.)

charges in connection with this matter of charge of a hundred dollars, and then later on a charge of \$89.50, which I believe brought the matter up to sometime in the early part of this year; and then I believe that there was this last visit in June, and the examination. A. Yes.

Q. And was there an additional charge for that?

A. Yes, there was a \$15 charge for that.

Q. \$15 additional charge for that?

A. Yes.

Q. And you consider those charges reasonable for your services? A. Yes.

Mr. Richard: Is there any question about the reasonableness of his charges on this bill here for Dr. Nutting, Dr. Norcross, Dr. Gump and Dr. Libby?

Mr. Deasy: Well, I don't see any need for calling them in; if the Doctor knows what they did, he can testify.

Mr. Richards: All right. Dr. Norcross was called? A. Yes, sir.

Q. And, in addition to that, Mr. Wibye testified that he made certain visits to Dr. Norcross' office.

A. Yes.

Q. Dr. Norcross here has a charge of \$33.50 for the consultation when he was called in at your instance; and of \$10 for the two visits made to his office. In your opinion, are those reasonable charges?

A. Yes, sir.

Q. There was also a charge by Drs. Nutting and

(Testimony of Lloyd D. Fisher.)

Gump on an eye examination, of \$10; and an additional examination and treatment, of \$15. In your opinion, are those charges reasonable?

A. Yes, sir.

Q. There were certain X-rays, of course. Those X-rays were made at your instance?

A. Yes, sir.

Q. Those X-rays were made by Dr. Hatcheck. There was an X-ray of \$12,50; there is another one here, \$20, for the X-rays taken. In your opinion, were those charges reasonable? A. Yes, sir.

Q. Dr. Libby has a charge, I believe, of \$5.00?

A. Yes.

Q. There is a bill here for the hospitalization for Mr. Harold Wibye, in the amount of \$100.79, and later on, a bill for the second period of hospitalization of \$59.95. In your opinion, are those reasonable? A. Yes, sir. [142]

Q. You prescribed physiotherapy? Physiotherapy was prescribed by you? A. Yes, it was.

Q. And Mr. Wibye has testified, I believe, that he had fifty to fifty-five physiotherapy treatments for charges—a charge here of \$250 which would be approximately \$2.50 per treatment.

A. Yes, that's the standard fee.

Q. Dr. Schock, I believe, assisted you in surgery?

A. That's right.

Q. That was on the same night as the accident, or very shortly thereafter, for which a charge of \$75 was made. A. That is correct.

(Testimony of Lloyd D. Fisher.)

Q. You believe that to be reasonable?

A. Yes. As a matter of fact, he did the repairs on Harold Wibye while I was working on——

Q. You were working on Mr. Nels Wibye at the same time, were you not? A. That's right.

Q. In addition, you learned that Mr. Wibye had gone to Jones and Naffziger's office in connection with the trouble involving his head; and I believe you testified that he was there for a full examination, and then he made one further treatment, and a bill was rendered by Drs. Jones and Naffziger in the amount of \$75. Do you believe that is [143] reasonable?

A. Yes, that's about what it is.

Q. Now, turning to Nels Wbye, did you upon that same evening see Nels Wibye?

A. Yes, I did.

Q. And you examined him at that time?

A. Yes.

Q. Will you tell us just what your examination disclosed?

He had lacerations of his chin and his left axilla—that is the arm pit. Now, his left forearm and left hand, and on his right upper arm, right wrist—the laceration of the wrist had severed three tendons, three extension tendons: That of the upper left arm had partially severed the triceps tendon. That is the muscle that extends the elbow. There were multiple bruises and abrasions. He had marked pain on moving either leg, and there was abnormal mobility of

(Testimony of Lloyd D. Fisher.)

the right leg just below the knee. In other words, you could move it from side to side much more than a normal limb would move. X-rays were taken of these, which revealed a fracture of the left acetabulum. That is the socket of the hip joint, in the left side. The posterior lip was fractured and displaced. There was an intratrochanteric fracture of the right hip. That is a fracture running through the prominence of the hip that you feel under the skin, and it was complete and the fragments were displaced. That is, the leg [144] was riding upward.

There was a comminuted fracture of the right upper tibia—that's the main bone in the lower leg—into the knee joint; spasm, shock. I don't have here just what his pressure was, but we had to treat his shock by giving him several units of blood plasma.

We then took him to surgery and debrided and repaired the various lacerations and the severed tendons and applied dressings; then placed a wire for traction through the right heel bone; and then, with traction on the leg, we applied a long-leg cast, immobilized this fracture below the knee, and then we put him in bed with traction apparatus and put a pole through that to control the fracture of his hip on the right, and also put skin traction on the left side to control the spasm and pain from the left hip fracture.

We also gave him—we put a splint on the right forearm to take the tension away from the repaired

(Testimony of Lloyd D. Fisher.)

tendons. He was also placed on penicillin, a regime of penicillin to ward off infection.

For several days following that, he had a great deal of gastrointestinal disturbance to such an extent that we had to put down a stomach tube, and give him fluid by vein; and we took it out after several days, but he began to vomit again and we had to replace it, but finally overcame that condition.

On November 22, of '46, we did an open reduction of the fracture of the right tibia. That is, we opened it up, put the fragments together and fixed it with several stainless steel screws, and then reapplied a cast.

Two weeks following that, a second operation was performed—this time on the left hip—putting back the posterior lip of the acetabulum which had been displaced and fixing it in position with two screws.

Q. Now, were X-rays taken, Dr. Fisher?

A. Yes, sir.

Q. Particularly of his knee and the hips and these various places. Do you have those X-rays with you? A. Yes.

Q. Those were taken under your direction?

A. Yes, they were.

Q. And do you want to show the X-rays there that would have been significant, showing the various fractures? A. All right, sir.

The Court: Well, he doesn't need to show them as far as I am concerned unless the other side wants to see them. The testimony of the doctor covers it, unless the other side wants to see it.

(Testimony of Lloyd D. Fisher.)

Mr. Deasy: No, I don't particularly.

Mr. Richard: I think they should be offered in evidence.

The Court: You may put them in evidence. [146]

Mr. Richard: Do you have those, Doctor?

A. Yes. Do you want just the ones that tell the general story?

Q. I would suggest, yes, because you have lots of X-rays here. There is no use of burdening the record with other than the ones that show the——

The Court: Put in evidence any of the X-rays you wish.

The Witness: (Indicating) This is a film of the right hip, taken December 9, 1946.

Mr. Richard: Just identify them so we will know what they refer to.

The Witness: There is also an anteroposterior view of the pelvis, taken November 11, 1946, showing the fracture of the left acetabulum and the fracture of the right trochanter.

Mr. Richard: We offer those in evidence, if your Honor please.

The Clerk: Do you wish them marked separately or as a group?

The Court: You had better mark them in the order in which he referred to them. The first X-ray that he referred to will be twelve, is it?

The Clerk: Yes.

The Court: And the next one will be thirteen.

(Testimony of Lloyd D. Fisher.)

(The X-rays referred to were admitted in evidence and [147] marked Plaintiff's Exhibits Nos. 12 and 13, respectively.)

Q. (By Mr. Richard): Do you want to use this, Doctor?

A. This is a lateral view of the right hip, showing the fracture of the right trochanter, taken November 13, 1946.

Mr. Richard: We offer that, if your Honor please.

The Clerk: 14.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 14.)

The Witness: This is an anteroposterior view of the left knee—the right knee, taken November 8, 1946, the day of the injury, showing a comminuted fracture through the head of the right tibia, with displacement of the fragments.

Mr. Richard: We offer that, if your Honor please.

The Clerk: 15.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 15.)

The Witness: This a lateral view of the right knee, taken February 3, 1947, showing the old fracture of the right tibia which had been fixed with four metallic screws.

Mr. Richard: We offer that, please.

The Clerk: 16.

(Testimony of Lloyd D. Fisher.)

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 16.)

The Witness: This is an anteroposterior view of the—it should be right hip—taken November 8, 1946, showing [148] the intratrochanteric fracture.

Mr. Richard: Next in order.

The Clerk: 17.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 17.)

The Witness: This is an anteroposterior view of the right knee, taken February 3, 1947, showing the old fracture which has been fixed with metallic screws.

Mr. Richard: Next in order.

The Clerk: 18.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 18.)

The Witness: This is an anteroposterior view, taken of the left hip, taken February, 1947, showing the acetabular fracture reduced and fixed with two metallic screws.

Mr. Richard: Next in order.

The Clerk: 19.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 18.)

The Witness: These films——

Mr. Richard: We will not bother with the films.

(Testimony of Lloyd D. Fisher.)

The Witness: This is the part that we haven't covered yet. It was a later procedure on the right hip.

Mr. Richard: All right.

The Witness: This is an anteroposterior view, the [149] right hip, taken June 7, 1949, which shows the old fracture and osteotomy of the right femur.

Q. (By Mr. Richard): What is osteotomy, Dr. Fisher?

A. Well, that's where you cut the bone. You do it to change the angle. That was the purpose in this case, fixed with a metallic nail and screws.

Q. That was done subsequent to the original operations, was it not?

A. Yes, the original, under traction. He had two fractures in that leg; and under traction, it was at first in good position and gradually lost some position in spite of the traction. It looked as though it might be good, but on actual using, when we got him on his feet, we found that he was quite limited in the abduction. He couldn't bring the leg out, and it gave him a very awkward gait. He couldn't walk well; so we took him back in the hospital and cut the bone through here, changing the angle in relation to (Indicating)——

Q. You indicate you cut the bone through here, and you refer to what?

A. Referring to the subtrochanteric area of the left femur.

Q. That is below the socket?

(Testimony of Lloyd D. Fisher.)

A. Yes, below the socket; yet.

Q. Then, that was fixed with——

A. That was fixed with an angle nail, a Moore—a hip nail.

Q. Which is shown in the X-ray? [150]

A. Yes.

Mr. Richard: We offer this in evidence, your Honor.

The Clerk: 20.

(In evidence as Plaintiff's Exhibit No. 20.)

The Witness: This is a lateral view of the same right hip, the same date as the previous one, that is, June 7, 1949, showing the same fracture and osteotomy with nail and screw fixation from the lateral aspect.

Mr. Richard: We offer that.

The Clerk: 21.

(The X-ray referred to was received in evidence and marked Plaintiff's Exhibit No. 21.)

Q. (By Mr. Richard): Those are the significant X-rays? A. Yes, sir.

Q. Mr. Wibye testified that he was in Providence Hospital continuously from the date of his admission on November 8th, until, I believe, sometime in March of 1947.

A. Yes; that's right.

Q. And he was under your treatment during that entire time? A. He was.

Q. And then he was readmitted to the hospital at

(Testimony of Lloyd D. Fisher.)

a later date I believe, when this operation took place that you just indicated?

A. Yes, sir.

Q. Is that right? A. Yes, that's right.

Q. And he was in that time a period—does your record show that?

A. Yes, on June 11, 1947, the osteotomy and nailing was performed.

Q. And he was in the hospital for what period of time then?

A. Until the 21st of June, 1947.

Q. Of June, 1947. Now, he has been under your care ever since that time?

A. Yes, he has.

Q. And you last saw him, I believe, sometime in June, did you not? A. Yes, sir.

Q. And at that time, did you examine him?

A. Yes, I did.

Q. What did that examination disclose?

A. That was on June 6 of 1949; and he complained in relation to his right knee, that his motion was still limited, that it aches occasionally just below the knee, and that once or twice a month this pain will become rather severe. Occasionally he complained that all the strength goes out of it—as he put it—so that when he walks, he does so a little guardedly because it has gone out and he is afraid that it might, and he has to watch it.

In relation to the right hip, he complained of aching in the hip at times. [152]

(Testimony of Lloyd D. Fisher.)

Q. Now, before we get to the right hip, you spoke of the limitation in motion in the right knee. What is that and to what extent? That is, what particular motion is involved?

A. Well, I was going to cover that in my examination. I am just covering what he complained of now.

Q. That's right. That is all right.

A. It is the right hip. He complained of it aching at times and stated that when he was in confined quarters, the hip—that when he was confined to his quarters, his hip felt good, but when he went out walking and was in the field, as he put it, that he couldn't seem to handle his leg well, that it tired and he couldn't co-ordinate it as well as the other one.

Q. Did you examine his right hand, Doctor?

A. Yes.

Q. What do you now find?

A. He complained of tenderness which persisted over the dorsal of the hand and said there was a sensitive area there, indicating over the first or fourth metacarpals; and he said that if he bumped anything with it, it gave considerable pain, and that he didn't have as much strength in it as he had before.

The left hand, he complained that the thumb had sort of a numb sensation in it and that he didn't have the grip in it that he should have. He also had a highly sensitive area [153] over the proximal

(Testimony of Lloyd D. Fisher.)

portion of the first—he indicated a place which was the proximal portion of the first metatarsal. It was over here (Indicating); and the left hip, he said that it previously, or about three weeks prior to the time I saw him, he said he had pain in it several times, and that this had occurred after he had done considerable walking.

He complained of his back, stating that it ached almost all the time; that sometimes it was quite bad and then again it would subside, more apt to ache after activity.

Q. What, in your opinion, Doctor, was the cause of the trouble in the back?

A. Well, I think, with his two injuries to the hips, and in addition to a back strain, that that is what is causing his trouble. Mechanically, the instrument is a little different now than it was; and technically, with the limitation of the knee—and I think that those factors probably keep up the irritation the back which was caused by the original injury.

Incidentally, I forgot to mention that he complained of his back when he was in the hospital and afterward, and that we took X-rays of the spine, but which were negative, so I didn't put them in as evidence; and he still has that back pain.

Q. Now, did you examine him from an orthopedic standpoint yourself in June? [154]

A. Yes, sir; I did.

Q. Will you tell us what that disclosed?

(Testimony of Lloyd D. Fisher.)

A. I examined the motion of the knees, comparing the right with the left, and he could extend both knees fully; but on flexing them, he had 125 degrees of flexion on the right, whereas, on the left, he had 152 degrees.

Q. That is bending back?

A. That is bending the knee back. In other words, he lacked 27 degrees of normal motion in the knee; and by measuring the distance of the heel to the buttocks, it gives you a better mental picture of it, I believe.

On the right, the heel would only come within nine and a half inches of the buttocks; and on the left, it came to three and three quarters inches.

He had tenderness posterior to the tibia on the right. In other words, on the lateral side of his knee behind and below the knee joint; and, of course, there were surgical scars there which were only slightly tender. He had a marked contracting of moving the right knee. I measured the circumference of the legs above the knee, at the knee, and below the knee, and, in general the right ones were smaller than the left.

Q. The right was smaller than the left?

A. Yes; 6 inches above the kneecap on the right was $17\frac{7}{8}$ compared with $18\frac{7}{8}$ on the left; in other words, an inch [155] difference, but the knee was a little bigger around because of the damage incurred. It was $16\frac{1}{8}$ at the middle of the kneecap on the right, and $15\frac{7}{8}$ on the left. That's a quarter

(Testimony of Lloyd D. Fisher.)

of an inch difference; and measuring 15 inches below the kneecap, the right was 14 inches; left $13\frac{3}{4}$, only a quarter of an inch difference there. Leg lengths were the same.

Q. Did you find scars on both hips from the surgical operations? A. Yes.

Q. How long, approximately, are they, Doctor?

A. There was an eight inch oblique scar over the left gluteal region; and over the right hip there is a $6\frac{1}{2}$ lateral longitudinal scar over the trochanter. He was tender over this scar in this mid-portion, and he said that's the spot that hurts him. He was unable to squat down without using his hands for support.

Q. That is because of the limited motion in the right knee?

A. Limited motion in the right knee; yes, sir. Measured his hip motions and the right hip motion was not as good as the left. Flexion of the hip—that is bringing it up this way (indicating)—115 on the right as compared to 125 on the left; ten degrees different. Abduction—that is bringing the hip out a way from the body—was the same. Adduction—bring it across the other leg—was 17 on the right [156] and 28 on the left, a difference of 9 degrees. Internal rotation—that is rolling the leg in—was 16 on the right and 37 on the left, a difference of 21 degrees. External rotation was equal.

Extension of the hip—that is bringing it back this way (indicating)—was 10 degrees on the right and

(Testimony of Lloyd D. Fisher.)

16 degrees on the left; and his back—I examined his back and there was tenderness over the spine of the 12th dorsal vertebra, and discomfort on extreme extension, and less discomfort on flexing the back; and on rotating it to the right, he can swing his body around.

The Court: The witness walked very slowly and I asked him what caused that and he said it was because of the knee. What is the reason, if any, for him to walk slowly?

A. Well, there is scarring around the knee. You noticed it's bigger than the other end and, of course, when you have a fracture, you not only damage the bone—that is, the fracture of displacement—you not only damage the bone but you tear the bone covering and some of the ligaments; and particularly in this fracture, he had tear of the knee capsule; and of course you have a scar there and it is like a scar on your hand and it usually has a certain amount of residual stiffness and thickness, and they can do better after they warm it up a bit than when they are sitting and first get up. They are a little slow. [157]

The Court: We will take a brief recess at this time.

(A short recess was taken.)

(Lloyd D. Fisher, being previously duly sworn, resumed the witness stand and testified further as follows:)

(Testimony of Lloyd D. Fisher.)

Direct Examination

(Continued)

By Mr. Richard:

Q. The X-rays that you say you took after the examination which was made on June 6 or 7, of the knee and of both hips, now there are pins or screws in the sides of each of those fractures?

A. Yes, sir.

Q. Do you find any calcification in these later X-rays in the vicinity of those screws or pegs that are of any significance?

A. Well, they are all—the fractures are all healed, of course, with new bone. That is calcification. There is, of course, some alteration of the joint surface of the knee, in spite of the surgery there as compared with normal; and there is calcification about the site of the fractured side of the tibia there which, in itself, doesn't interfere with knee motion, except that it makes the knee a little more bulky and tighter.

Q. Well, Doctor, these pins and screws and so forth, in your opinion, should they remain there permanently?

A. Well, we find that hip pins in a patient very frequently [158] do better when the pin is removed after the bone is well healed. After a patient is reasonably active for a time, they seem to give a certain amount of irritation; and he still complains of some discomfort around the right hip, and I suggested to him that it would be probably helpful to

(Testimony of Lloyd D. Fisher.)

remove the pin in the right hip and nail on the right hip.

Q. That would require an operation?

A. Yes.

Q. And a period of hospitalization for about how long?

A. Well, perhaps four or five days.

Q. And inactivity for any period of time thereafter?

A. Yes, inactivity for the first ten days; and following that he could increase activity. He should be back to where he is now in about six weeks.

Q. What would be a reasonable charge for the hospitalization and operative surgery and care?

A. Well, five days, say, with the cost of surgery and X-ray, that would be \$150; and surgeon's fee, \$75, with the following care. That would be about \$225, I would say.

Q. Now, Dr. Fisher, for your services, there was a bill to Mr. Nels Wibye dated the 9th day of April, in the amount of \$1146.25 and then your total bill at the present time, I believe you told me, would be \$1171, which is twenty-five more than that charge.

A. Correct. [159]

Q. In your opinion——

A. That—of course, there were the X-rays in addition to that. I had forgotten to mention those were taken in my office. There was his hip—both hips and the knee. That's \$33.25 in addition.

Q. In addition?

(Testimony of Lloyd D. Fisher.)

A. Yes; that would make \$1204.25.

Q. \$1204.25? A. Yes.

Q. Now, he was rendered a bill for his entire hospitalization in the amount of \$1716.59. Do you believe that to be a reasonable charge, being the regular rates charged by Providence Hospital?

A. Yes, sir.

Q. He was under the care, was he not, of special nurses for a considerable period of time?

A. Yes, he was at first there for quite a while.

Q. And the charge for nurses was \$900, for special nurses. You believe that to be reasonable?

A. Yes, sir.

Q. Dr. Norcross has made a charge of \$25. In your opinion, is that reasonable? A. Yes, sir.

Q. And Dr. Pecoek, was he associated with you, or what?

A. No, I asked him to see him, I believe, when I was away [160] on a vacation.

Q. That was his testimony. For which he made a charge of \$25? A. Yes, sir.

Q. Which you believe reasonable? A. Yes.

Q. And Dr. Libby—— A. Yes.

Q. (Continuing)——a charge of \$50.00.

A. Yes, sir.

Q. Which you believe reasonable?

A. Yes, he assisted in surgery, I believe.

Q. Correct. And there was a total charge up to the last X-rays—which you say were \$33.50, and \$235 for X-ray pictures——

(Testimony of Lloyd D. Fisher.)

A. Yes, that seems about right.

Q. This vibrator, I believe you said that you did not particularly prescribe that. He purchased a vibrator for massage.

A. I mentioned to him once that it was a good thing to have. I don't remember exactly telling him to buy it.

Q. Now, Dr. Fisher, in your history and discussions with this man, you learned that he had been engaged for a number of years before this accident in construction, particularly heavy construction, did you not? [161]

A. Yes, sir.

Q. In your opinion, what is the prognosis, as far as this man is concerned?

A. Well, I feel that, except for removing the nail, which will give him probably some improvement in his right hip, that his condition is stationary; and as far as occupation goes, I am sure that he will never be able to do heavy construction again. He could, however, I believe, do some lighter type of work but not work requiring a lot of climbing or squatting. He can't squat.

Mr. Richard: You may cross-examine.

Cross-Examination

By Mr. Deasy:

Q. I think you said, Doctor, that if you decided to remove the nail from the right hip, the total cost of that procedure would be approximately \$225. Wasn't that what you said?

A. Yes; that's right.

(Testimony of Lloyd D. Fisher.)

Q. I think you also stated that there was a necessity for some further surgery upon Mr. Harold Wibye?

A. Yes. I think that would help him.

Q. What was that? I didn't make a note of that.

A. Well, I don't know that we made any statement as to the cost of that.

Q. I understand you said that the hospital would be about \$100, and ——[162]

Mr. Richard: Which one was that?

Mr. Deasy: For Harold Wibye. I got a figure of \$100 for hospital and \$250 for a doctor for some future procedure but I don't know what that procedure was to be.

The Witness: We did mention hospitalization for traction for the two weeks.

The Court: The Doctor said that he recommended his condition might be improved by a further period of traction in the hospital for some period of time.

Q. That's right, isn't' it, Doctor? A. Yes.

The Court: He was giving you the costs involved in that.

Mr. Deasy: Yes.

Q. Now, you stated, I believe, in relation to Mr. Harold Wibye, that the X-rays showed the presence of a small metallic body in his jaw. What was that, Doctor?

A. Well, there was some previous injury, a little piece of metal had penetrated into the soft tissue in

(Testimony of Lloyd D. Fisher.)

his jaw and was still there, hadn't give any trouble, and it was never removed, apparently.

Q. As to the present condition of Mr. Harold Wibye, in effect, at the present time, would you describe his condition as being more or less a persistent stiff neck and this bony or whatever kind of lump it is on his knee. [163]

A. No, it isn't. His neck isn't really stiff; it's a very painful neck. It is fairly mobile, however—quite mobile—but it has a smart tenderness. This marked tenderness and the spasm over a long period—sometimes it is more, sometimes it is less—and the same way of the tenderness. It always had tenderness every time I examined him, in the back of his neck; but sometimes it is more acute than others, and there is usually more or less spasm of the muscles; that is, it is stiff, in that he doesn't like to turn it suddenly without guarding, but when you put him through the full range of motion, he has a normal range.

Q. It isn't a question of a loss of motion?

A. It isn't limited motion; it's guarded motion.

Q. Could that condition come from spasm in the neck, come from a general nervousness, from his nervousness or tension?

A. Well, of course, that always adds to it, but where you have a general condition of tension, of course, you are tense all over; but this is tension, spasm, over and above. I mean, you can be tense and yet you can relax enough to make movements and do things and there is no actual spasm in the

(Testimony of Lloyd D. Fisher.)

muscle and nervous tension, but this is an actual nervous spasm.

Q. What do you consider the cause of the muscle spasm? That is a symptom, isn't it?

A. It is a reflex reaction to pain, to discomfort. [164]

The Court: Well, was there any actual injury that you found to the neck?

A. Well, the injury—I mean there is no cut in the neck. He had some abrasions on the head. Of course, he was knocked out. He was actually rendered unconscious; and then he had this severe pain in his neck when I first saw him. He complained of it in his neck and going around the left side of his head to his eye, and going down in his left shoulder. In fact, he thought he might have a fractured collar bone, he had so much pain there. We X-rayed the—or possibly the ribs, and we X-rayed the chest, too.

Q. (By Mr. Deasy): Did you find any injury to the nerves in the neck? A. No.

Q. In the shoulder?

A. No, I thought there might possibly be because he didn't handle his left arm very well. I mean, it hurt him when he did; and he didn't have any grip in it, and that's why I had Dr. Norcross examine him. He is a neurosurgeon. I thought there might be something that he could find, and his word would be better than mine on that score.

The Court: Well, couldn't he engage in reasonable activity in connection with his former occupa-

(Testimony of Lloyd D. Fisher.)

tion, provided he didn't have to do excessive physical activities, lifting heavy things or do a lot of climbing or——

A. Yes, I say he could do light work, but I don't think— [165] the way I—you understand, I am not a construction man, but I mean, if they have got a job to do, they don't show them any favors. They have got to do their jobs. Of course, if he had some special arrangement where he could limit his activity somewhat, there is no doubt in my mind that he could do a certain amount of work; but under a handicap, of course, of this recurrent pain and lack of sleep and that sort of thing——

Q. (By Mr. Deasy): Well, you stated, Doctor, that in your opinion, Mr. Harold Wibye was disabled from doing work that he previously had done. Now, what did you understand the work he previously had done to be?

A. He had been, to my understand, on heavy construction work and heavy machinery in connection with excavations and construction and that sort of thing. It's just my idea.

Q. What did you understand he actually did in connection with those machines?

A. Well, apparently from what I talked to him, he has done a number of jobs in that connection. He has, on occasions, been a foreman, but a type of foreman where they have to get in and show the men how to do the work, and work with them.

Q. Would you say that this injury which he suffered would incapacitate him from being the gen-

(Testimony of Lloyd D. Fisher.)

eral supervisor or superintendent of a construction project? [166]

A. Well, I mean if he could hold down a job as a superintendent; I mean if he could qualify and get someone to give him that sort of a job, I think he could do that.

Q. Assuming that he was mentally, and as far as ability is concerned, qualified to be in charge of a construction project, do you think that he would be disabled from doing that kind of work?

A. He would be doing it under a handicap with respect to the nights he didn't get much sleep. He wouldn't be in as good shape, however, with that handicap.

The Court: That would affect anybody doing any kind of work.

A. That's right, even light work. I mean, where you had to concentrate mentally on any job.

Q. (By Mr. Deasy): Now, as to Mr. Nels Wibye, you stated, in your opinion, he would probably be permanently disabled, did you, from any work requiring him to do any squatting or climbing of ladders and things of that kind?

A. Yes, any heavy work, heavy lifting. I said anything but heavy work, providing he didn't have to do a lot of climbing or squatting.

The Court: He could do ordinary carpentry work?

A. Well, if he had to climb on the scaffolding and framing, it would be rather dangerous; yes.

(Testimony of Lloyd D. Fisher.)

Q. Yes, there would be an instability there. [167]

A. Yes, he wouldn't be sure and he would be liable to fall.

Q. But he could do carpentry work if he could remain within a limited area and not have to do climbing? A. Yes.

Q. He could nail boards on the wall and saw and do a lot of things of that kind?

A. Bench work and cabinet work he could probably do, if he is qualified. I don't know.

Q. (By Mr. Deasy): And would your answer to his future ability to do supervisory work or act as a superintendent or general foreman be the same as your answer was with regard to his brother?

A. Well, I think he could do that work providing—with those exceptions I mentioned; yes.

The Court: Both men appeared to you to be men of rather good intelligence? They speak well?

A. That's right.

Q. And you saw Mr. Nels Wibye take off his shirt. He appears to be a pretty well nourished man.

A. Yes, they are both well built and intelligent, and apparently are industrious.

Q. They haven't been emaciated as a result of these injuries?

A. Nels has lost a lot of weight. He was quite thin at the time he got out of this hospital. [168]

The Court: He is now back to 185 pounds.

The Witness: Yes, he is now back to, I believe, almost to what he weighed before.

(Testimony of Lloyd D. Fisher.)

Mr. Deasy: I have no further questions.

Mr. Richard: I have just one question, Doctor.

Redirect Examination

By Mr. Richard:

Q. You spoke of this knob on Harold Wibye's knee. A. Yes, sir.

Q. And while you said you had not X-rayed it, that probably there had been a separation there that had more or less forced that up. Correct?

A. Well, what I mean to say is that the perosteum had probably been stretched, the bone covering; and of course there is always bleeding when you tear under the perosteum; and when that heals, the tissue beneath it will calcify; in other words, he probably has a sterile bone there.

Q. And you testified that it was a permanent condition and would remain such, but could be cut out by operative surgery? A. Yes, sir.

Q. That would cost about how much? First, do you believe, reasonably, that that should be done?

A. If he can get back on the job—that that is a deterrant—I believe he certainly should have it done.

Q. Would you estimate the reasonable cost of the hospitalization and medical care on that? [169]

A. Oh, I would say \$150 probably would cover it.

Q. Would there be incapacity as far as he was concerned?

A. He wouldn't be able to kneel on that for about a month or for six weeks, I would say.

(Testimony of Lloyd D. Fisher.)

Mr. Deasy: No further questions.

The Court: That is all.

Mr. Richard: The Doctor may be excused?

Mr. Deasy: Yes.

Mr. Richard: Thank you, Dr. Fisher.

(Witness excused.)

Mr. Richard: Do you have, Mr. Deasy, that itinerary?

Mr. Deasy: I was about to offer that in evidence.

The Court: Did you want to present any more evidence?

Mr. Richard: Just this itinerary that I was going to offer in evidence. That's—let's see, there was a certified copy.

Mr. Deasy: May I offer that, so that when the case is over I will be able to get it back?

Mr. Richard: Well, it doesn't make any difference. I simply want to offer it as a part of my case.

Mr. Deasy: That is all right.

Mr. Richard: But, as far as getting it back——

Mr. Deasy: That is all right.

Mr. Richard: You can substitute a copy for this as far as I am concerned. [170]

Mr. Deasy: Well, that's all right; you go ahead and offer it.

Mr. Richard: All right, we offer this; and if your Honor please, I would like to read it.

The Clerk: Exhibit 22.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 22.)

The Court: You may read it.

Mr. Richard: If your Honor please, this is a copy, certified as a true copy:

"W. W. McCarthy

Major Quartermaster Corps"

a letter on the letterhead of Sorensen Bros—

"Stockton General Depot.

United States Army.

Stockton 1 California

KMDNF QS—1310.1 16 October, 1946.

Subject: Itinerary of Liaison Team

Mr. John Hadley

Stockton QM Liaison Representative

Seattle General Depot

4735 E Marginal Way

Seattle 4 Washington

Enclosed herewith is itinerary for Mr. John Hadley

Zone V, Stockton General Depot for period 1 November [171]

through 30 November.

2. This office should be notified immediately of any necessary changes in this schedule.

For the Quartermaster Supply Officer

(Signed) Robert J. McIntyre, Jr.

Major QMC Director, Stock Control Division."

The enclosure:

“Stockton General Depot, U. S. Army

Stockton 1, California

Office of the Quartermaster Supply Officer

Itineraries for Liaison Teams, Zone 5

Month November, 1946, Date October 16, 1946”

And I desire only to read down to the first eleven days.

“1. (On the first day of November) Travel.

2. Saturday

3. Sunday

4. Stockton General Depot

5. Stockton General Depot

6. Stockton General Depot

7. Travel

8. Travel

9. Saturday

10. Sunday

11 Fort Lewis”

And Fort Lewis also appears on the 12th, 13th, 14th and 15th. [172]

I make the further observation that upon dates which are Saturday and Sunday upon the itinerary, that they are merely marked Saturday and Sunday. And that is marked:

“A true copy

W. W. McCarthy, Jr.

Major QMC.”

if your Honor please.

Mr. Richard: That is all for the plaintiff, if your Honor please.

(Plaintiff rests.)

Mr. Deasy: We have no additional evidence, your Honor.

(Defendant rests.)

The Court: Now, is there anything—have you any records to show anything about this automobile? Is this an automobile of the Quartermaster's Depot in Stockton, and did it come from Seattle? What do the records show with respect to the matter? I think the Court should have all this information—the factual information concerning the matter. Is there any way of getting that?

Mr. Richard: We have been unable to get anything at all.

Mr. Deasy: Well——

The Court: You could have gotten it. We have all the discovery procedure that is open in the Federal Court, and there is really no reason for the Court having to pry into these things. The interrogatories could have been directed [173] to the government and requests made on all of these matters concerning this car and Mr. Hadley, and all could have been obtained before trial.

Mr. Richard: If your Honor please, I did take that matter into issue, in view of the fact that there is an admission that the automobile was owned by the United States of America.

The Court: It might have effect, the question of whether he was using it in course of his duty. Now, all the itinerary shows is that the man was on travel time. I don't know whether he was traveling in this automobile or not.

Mr. Deasy: I think we could stipulate to that, your Honor.

The Court: These are matters that should be developed. I have got to do a lot of guessing in this case concerning the facts. These are matters that can be easily presented to the Court:

Mr. Deasy: I think we can stipulate, your Honor, that Mr. —

The Court: You shouldn't stipulate to anything unless you know that it is a fact, both representing the government and representing the defendant in the matter. Now, it seems to me that you could easily find out if you don't know already, where this automobile came from, where it was being used and [174] so forth.

Mr. Deasy: Well, my understanding is this, your Honor: That it was a government car, an Army car; that Mr. Hadley operated the car in making these trips, in accordance with this itinerary in connection with his duties as liaison officer; that he was authorized to use the car in accordance with the itinerary.

The Court: In other words, you are satisfied that the Government can stipulate that Hadley left Seattle with this car, which was a government car which he was entitled to use, and that he drove with that car down to Stockton?

Mr. Deasy: Yes, your Honor.

The Court: And that he was going to drive back with it to——

Mr. Richard: Fort Lewis.

The Court: To Fort Lewis?

Mr. Deasy: Fort Lewis, in accordance with this itinerary.

The Court: All right then, that is all right if you make that stipulation on behalf of the Government.

Mr. Deasy: Yes, my understanding is that he was authorized to use the car for the purpose for the number of days covered in this itinerary, in accordance with the itinerary.

The Court: Yes.

Mr. Richard: Now, if your Honor please, as far as I am [175] concerned, I will be very frank about the point raised, your Honor, yesterday. We did make a preliminary study—not specifically that question. We were unable to find any authorities at that time, and I believe that Mr. Deasy is in the same position, and I presume that the Court would like to have authority upon that subject.

The Court: Well, I think the question, Mr. Richard, that you have here—and I am not saying that I haven't any opposing view to the plaintiff in this case—but it is important to cover, to have the question clarified as to whether or not, under the facts as we have them now, the plaintiff—the deceased was acting in the course of his employment at the time. And that will depend on the weight of the testimony—this presumption, if it is applicable—and from that, we will have to decide whether or not this man was acting in the course of his employment at the time.

Mr. Richard: Now, if your Honor please, if I might ask the Court this?

The Court: Yes.

Mr. Richard: Do I understand that the point raised by the Court is that, first, we must determine, we must interpret the Tort Act itself, looked at in the light not particularly of California law, to determine whether or not the Court actually has jurisdiction of this case?

The Court: It might be that; it may be and you might [176] well argue. I am looking at it from your point of view, that there is sufficient evidence without resorting to the presumption.

Mr. Richard: Yes. Of course we do make that claim now of course, but I just wanted to get your Honor——

The Court: But at that time when the matter came up, the question in my mind was the absence of any evidence at all as to what the man was doing with this car at the time, except that there he was and it was a government car, whether or not this presumption, of evidentiary presumption in the California law would be sufficient to make a *prima facie* case.

Mr. Richard: Do I understand your Honor to believe that it might be significant that the statute itself says that the Government is liable if the employee is in the course and scope of his employment, that the fact that it is pointed out in the statute means that he must be in the course of his employment might be significant?

Now, I think that example will show me just exactly where I should go. There is a case in Cali-

ifornia that I referred to yesterday in which the Oxnard Harbor District, a political subdivision, was a defendant, where liability is created, purely statutory under a statute of the State of California. That statute, of course, requires that the employee be in the course and scope of his employment. [177]

Now, does your Honor feel that it might be that because it is the United States Government rather than any other political subdivision that there might be a different rule? In other words, that we would apply a different rule to the United States?

The Court: That——

Mr. Richard: Or the county or any other political division?

The Court: That is purely an academic question. I don't want to have to answer that. You will find that there are a number of decisions already, of course, in the Federal Tort Claims Act, on this question of interpretation. You have got the question of Federal Statutes.

Mr. Richard: Of the Act itself?

The Court: Of the Act of a Federal Statute. You have got the question of how far the rules of evidence of the State would bind, whether or not this is a matter of substantive law.

Mr. Richard: I understand.

The Court: However, that situation may be somewhat changed now by the testimony of the mother of the deceased employee and by this itinerary and by the type of government, so that we really may not need now to resort to the presump-

tion at all. We may now have a situation where here is a man who is driving a government automobile which he was to use on a trip and he finished his work at Stockton and he [178] was going over to have dinner with his mother and then was going to proceed—presumably, according to his attorney—up North; whether or not the accident happening at that time he was in the course of his employment. You have the question of whether, under the facts of the case, there is a case of acting within the course and scope of employment.

Mr. Richard: Should authorities be furnished?

The Court: I think it would be best if you present memorandums in this case.

Mr. Richard: And who shall open?

The Court: I think you should open and discuss the question as to whether or not it was within the course and scope of his employment; then I should like also if you would, to present along with your memorandum, a statement of the amounts, because some of the amounts I have not made notes of, of the complete claim of damages of each one.

I also should like to have your views—aside from the special item of damages—what your view is of the general damage, based upon the evidence presented in this case; and Mr. Deasy can file his memorandum and cover the same matters.

Mr. Deasy: Yes, your Honor.

Mr. Richard: And the time?

The Court: How much time would you want to file your opening memorandum?

Mr. Richard: Fifteen days. [179]

The Court: Fine.

Mr. Deasy: How much to reply? May we have fifteen to reply?

The Court: Fifteen, fifteen and five. [180]

Certificate of Reporter

I, C. E. Moneyhun, Official Reporter Pro Tem, certify that the foregoing transcript of 180 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ C. E. MONEYHUN.

May 19, 1950.

[Endorsed]: Filed May 18, 1950.

[Endorsed]: No. 12537. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Niels K. Wibye, Appellee. United States of America, Appellant, vs. Harold Wibye, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed May 3, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Consolidated Cases No. 12537

UNITED STATES OF AMERICA,

Appellant,

vs.

NIELS K. WIBYE,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

HAROLD WIBYE,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

That the trial Court erred

I.

In finding that John E. Hadley was acting within the course and scope of his employment as an agent, servant or employee of the United States of America at the time and date of the accident.

II.

That John E. Hadley was negligent.

III.

That the evidence of the mother of John E. Hadley was sufficient to establish that John E. Hadley

was on Government business at the time of the accident.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Appellant,
United States of
America.

[Endorsed]: Filed May 19, 1950.

[Title of Court of Appeals and Causes.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above-Entitled Court and to
Messrs. Nichols, Richard & Allard, Attorneys
for Plaintiffs:

The appellant, United States of America, by its attorney herein, hereby designates for inclusion in the transcript of record upon appeal, the complete record, and all the proceedings and evidence in the action.

Dated: May 18th, 1950.

/s/ FRANK J. HENNESSY,
Attorney for Appellant,
United States of
America.

[Endorsed]: Filed May 19, 1950.